TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 509

ELIJAH REED, PETITIONER,

vs.

STEAMSHIP YAKA, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 12, 1962
CERTIORARI GRANTED DECEMBER 17, 1962

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APPELLANTS' CONSOLIDATED APPENDIX.

RELEVANT DOCKET ENTRIES.

Mar. 10, 1958. Libel filed. Libellant's Interrogatories filed.

Mar. 10, 1958. Attachment exit—returnable April 4, 1958. Error—See #213 of 1958.

Sept. 30, 1958. Answer filed.

Oct. 7, 1958. Order to place case on the trial list, filed.

Oct. 7, 1958. Respondent's answers to libellant's interrogatories, filed.

Dec. 29, 1958. Impleading Petition under 56th Rule, impleading Pan Atlantic Steamship Corporation and Order of Court granting petition filed.

Dec. 29, 1958. Citation under 56th Rule exit—returnable 1-16-1959.

Jan. 6, 1959. Respondent's bond for costs in $250.00 with The Aetna Casualty & Surety Co. as surety, filed.

Jan. 19, 1959. Citation under 56th Rule returned "on 1-12-59 served" and filed.

Feb. 13, 1959. Libellant's interrogatories to impleaded respondent, filed.

Mar. 3, 1959. Appearance of Krusen, Evans & Shaw, Esq. for impleaded respondent, filed.

Mar. 5, 1959. Motion of Pan-Atlantic Steamship Corp. to strike answer of Waterman Steamship Corp., etc., filed.

Mar. 26, 1959. Libellant's motion for and Order of Court directing Impleaded Respondent to answer interrogatories within 15 days, filed.

Apr. 23, 1959. Affidavit of Mark D. Alspach, filed.

Apr. 24, 1959. Argued sur motion of Pan-Atlantic Steamship Corp. to strike answer of Waterman Steamship Corp. CAV.

May 11, 1959. Impleaded respondent's answers to libellant's interrogatories, filed.

May 25, 1959. Opinion, Kirkpatrick, J., denying motion of Pan-Atlantic Steamship Corp. to strike, except as to (d) of the prayer, which is granted, filed.

June 12, 1959. Respondent's notice of taking deposition of John C. Tattersall, filed.

Aug. 19, 1959. Libellant's pre-trial memorandum filed (# 339 of 1956).

Sept. 17, 1959. Respondent's pre-trial memorandum, filed.

Sept. 22, 1959. Pre-trial memorandum of Pan Atlantic Steamship Corp., filed.

Sept. 22, 1959. Pre-trial conference.

Sept. 28, 1959. Pre-trial report VanDusen, J., filed. (339 of 1956).

Sept. 28, 1959. Preliminary pre-trial memo., filed. (339 of 1956).

Oct. 2, 1959. Answer of Pan-Atlantic Steamship Corp., as claimant of SS Yaka, to libel, and Claim of Pan-Atlantic Steamship Corp., filed.

Oct. 2, 1959.	Answer of Pan-Atlantic Steamship Corp. to petition under the 56th Rule, filed.
Oct. 6, 1959.	Libellant's motion to compel production of documents, filed.
Oct. 12, 1959.	Order of Court that this case be tried first on issues of liability only, and that deposition of Mr. Tattersall be admitted in evidence in lieu of personal testimony, filed. 10-13-59 noted & notice mailed.
Nov. 5, 1959.	Libellant's notice of taking depositions of the Custodian of Records of the American Mutual Liability Insurance Co., filed.
Jan. 4, 1960.	Deposition of John C. Tattersall, filed.
Jan. 4, 1960.	Trial—witness sworn (with 339 of 1956).
Jan. 5, 1960.	Trial resumed. Eo die: Respondents move for dismissal—Argued—CAV.
Mar. 10, 1960.	Requests of Pan-Atlantic Steamship Corporation for Findings of Fact and Conclusions of Law, filed.
Mar. 23, 1960.	Transcript testimony 1/4/60 and 1/5/60 filed (#339/1956).
Apr. 29, 1960.	Libellant's requests for findings of fact and conclusions of law, filed.
Apr. 29, 1960.	Respondent's requests for findings of fact and conclusions of law, filed.
Apr. 29, 1960.	Libellant's trial brief, filed.
Apr. 29, 1960.	Respondent's trial brief, filed.
Apr. 29, 1960.	Impleaded Respondent's trial brief and requests for findings of fact, etc., filed.

Apr. 29, 1960. Trial Memorandum of Impleaded Respondent, filed.

Apr. 29, 1960. Libellant's reply memorandum to Respondent's trial memorandum, filed.

Apr. 29, 1960. Libellant's reply brief to Impleaded Respondent's brief, filed.

Apr. 29, 1960. Opinion (Clary J.) sur pleadings and proof, with findings of fact and conclusions of law, finding in favor of libellant, filed.

May 4, 1960. Order of Court amending opinion of 4-29-60, filed. 5-5-60 noted & copies mailed.

Aug. 24, 1960. Interlocutory Decree entering judgment in favor of libellant against the S. S. Yaka and Waterman Steamship Corporation and that upon payment of a money judgment by Waterman S.S. Corp., to libellant, it shall have judgment over against Pan-Atlantic Steamship Corp., in a like amount, filed. 8/25/60 noted & notice mailed.

Jan. 19, 1961. Stipulation for and Order entering judgment in favor of libellant and against SS Yaka and Waterman SS Corp. as owner and claimant in sum of $12,500 with interest and costs from date of entry of judgment, and in favor of Waterman SS Corp. owner and claimant of SS Yaka against Pan Atlantic SS Corp. in sum of $12,500 with interest and costs from date of entry of judgment, filed. 1-20-61 noted & notice mailed.

Mar. 21, 1961. Notice of appeal by impleaded respondent, filed. Copies to Freedman, Landy & Lorry, Esq. and Rawle & Henderson, Esq.

Mar. 21, 1961. Copy of Clerk's notice to U.S. Court of Appeals, filed.

Mar. 23, 1961. Notice of appeal by respondent, filed. Copies to Freedman, Landy & Lorry, Esq. and Krusen, Evans & Shaw, Esq.

Mar. 23, 1961. Copy of Clerk's notice to U. S. Court of Appeals, filed.

LIBEL IN REM.

To the Honorable, the Judges of the Said Court:

The Libel and Complaint of Elijah Reed against the Steamship "Yaka" in a cause of action for personal injuries, alleges to wit:

1. Libellant is a citizen and resident of the Commonwealth of Pennsylvania, and at all times mentioned herein was employed as a longshoreman by the Pan-Atlantic Steamship Corp.

2. The Steamship "Yaka" is now or will be within the jurisdiction of this Court during the pendency of these proceedings.

3. On or about the 23rd day of March, 1956, and at all times herein mentioned, Pan-Atlantic Steamship Corp. of Philadelphia, was employed to load cargo on board the S. S. "Yaka" by virtue of authority from and an understanding entered into with the said vessel's owners, charterers, operators and duly authorized representatives.

4. On or about the 23rd day of March, 1956, at or about 4:45 o'clock P. M., libellant, in the course of his employment, engaged in the performance of his duties in connection with the loading of cargo on board the S. S. "Yaka" while the said S. S. "Yaka" was in navigable waters of the United States and moored at Pier A, Port Richmond, was working in the No. 2 tween deck hold upon a staging erected with pallets when one of the pallets broke, entrapping his foot as a draft of cargo was being moved into place, as the result of which he sustained the injuries which are more specifically set forth hereinafter.

5. The Steamship "Yaka" was unseaworthy in that:

(a) failing to provide a safe place for libellant to perform his duties;

(b) causing the erection of staging to stow cargo which was unsafe under the circumstances;

(c) permitting pallets to be used for staging which was inadequate, defective and unsafe;

(d) failing to properly and adequately inspect the staging used to stow said cargo;

(e) failing to supply libellant with proper and safe means to stow cargo;

(f) adopting for libellant's use unsafe, dangerous and unseaworthy pallets and staging material;

(g) failing to warn the libellant of the defective condition of the aforesaid pallet;

(h) failing to provide libellant with a safe and seaworthy vessel, equipped with adequate and proper equipment, appliances and appurtenances, and failing to maintain the same in a proper, safe and seaworthy condition;

(i) one or more pallets broke.

6. By reason of the unseaworthiness of the vessel as set forth above, libellant suffered severe injuries to his head, chest, back, spine, arms and legs; more specifically he suffered a fracture of the internal malleolus of the right ankle and injury to the said ankle joint including the muscles, nerves, tendons, blood vessels and ligaments attached thereto and connected therewith; he sustained a severe shock to his nerves and nervous system; he has suffered agonizing aches, pains, mental anguish and disability and upon information and belief avers that he will suffer severe pains, aches, mental anguish and disability in the future; he has been unable to assume his usual duties, occupations and avocations for a long period of time in the past, and upon information avers that his injuries have become aggravated and permanent and that he will be permanently disabled from performing his usual duties, occu-

pations and avocations in the future; he has been compelled to expend and incur obligations for medical attention in the past and will be required to do so in the future, to his loss and damage in the amount of Fifty Thousand Dollars ($50,000.00).

7. All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libellant claims the sum of Fifty Thousand Dollars ($50,000.00) and prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty jurisdiction may issue against the Steamship "Yaka", her boilers, engines, tackle, apparel and furniture and that all persons claiming any right or interest therein may be cited to appear and answer all and singular the matters aforesaid, and further commanding the Marshal in this district to attach the Steamship "Yaka", now docked within this district; and that this Honorable Court may be pleased to decree to the libellant damages as aforesaid, with interest and costs; that the said Steamship "Yaka", her boilers, engines, tackle, apparel and furniture may be condemned and sold to pay the same; and that this Honorable Court may decree such other and further relief as in law and justice the libellant may be entitled to receive.

FREEDMAN, LANDY AND LORRY,

By JOSEPH WEINER,

Proctors for Libellant.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

JOSEPH WEINER, being duly sworn according to law, deposes and says that he is a member of the firm of Freedman, Landy and Lorry, and that the facts set forth in the foregoing Libel are true and correct to the best of his knowledge, information and belief.

JOSEPH WEINER.

Sworn to and subscribed before me this 10th day of March, 1958.

JESSIE D. VALENTI,
Jessie D. Valenti
Notary Public, Philadelphia, Philadelphia Co.,
My Commission Expires February 23, 1961.

ANSWER TO LIBEL IN REM.

The answer of Waterman Steamship Corporation, as owner and claimant of Steamship YAKA, respondent, to the libel in rem of Elijah Reed, libellant, in a cause of action for personal injuries, civil and maritime, respectfully shows to this Honorable Court upon information and belief as follows:

1. Claimant admits upon information and belief the allegations contained in the First Article of the libel.

2. Claimant denies that Steamship YAKA is now within the jurisdiction of this Court, and it is without knowledge or means of information sufficient to form a belief as to whether the vessel will be within the jurisdiction as alleged in the Second Article. Claimant avers that it has voluntarily appeared as claimant to avoid attachment and delay of the vessel if it should subsequently be present.

3. Claimant is informed and believes that the vessel was engaged in loading cargo in the port of Philadelphia on or about March 23, 1956, as alleged in the Third Article. Claimant denies that Pan-Atlantic Steamship Corp. was employed to load the cargo, but on the contrary avers that Pan-Atlantic Steamship Corp. was at all material times acting as bareboat charterer of the said vessel, with full responsibility for her navigation, maintenance, use, loading and discharge. It is further denied that claimant, as owner, authorized or directed any operations of the vessel during the period of the bareboat charter, by its representatives or in any other manner whatsoever.

4. Claimant is without knowledge or means of information sufficient to form a belief regarding the matters alleged in the Fourth Article, which are accordingly denied and strict proof is demanded.

5. Claimant denies that the vessel was unseaworthy in any respect alleged in sub-paragraphs (a) through (i) at the

time of her delivery to Pan-Atlantic Steamship Corp. Claimant is without knowledge or means of information sufficient to form a belief as to whether any such condition arose after delivery to Pan-Atlantic Steamship Corp., and the said allegations to that extent are denied with demand for strict proof upon the trial of this cause. It is further alleged that if such an unseaworthy condition arose and was a direct or proximate cause of libellant's accident and/or injuries, such condition was solely caused by Pan-Atlantic Steamship Corp., its agents, servants and employees, as stevedoring contractors.

6. Claimant is without knowledge or means of information sufficient to form a belief regarding the nature and extent of libellant's injuries, losses and damages as alleged in the Sixth Article, which are accordingly denied and strict proof is demanded.

7. It is admitted that the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but it is denied that the premises are true as stated in the libel in rem except as herein expressly admitted.

8. Claimant avers that the premises herein are true.

WHEREFORE, the claimant respectfully requests your Honorable Court to dismiss the libel herein, with its costs.

RAWLE & HENDERSON,

By (s) HARRISON G. KILDARE,
Proctors for Claimant,
1910 Packard Building,
Philadelphia 2, Pa.

STATE OF ALABAMA }
COUNTY OF MOBILE } *ss.:*

W. H. SCHRADER, being duly sworn according to law, deposes and says that he is an officer of Waterman Steamship Corporation, owner and claimant of Steamship YAKA; that he is authorized to make this affidavit on behalf of the claimant corporation; that he has read the foregoing answer to libel in rem, and that the facts therein stated are true and correct to the best of his knowledge and belief, based upon information obtained from agents, employees, representatives and records of the claimant corporation.

/s/ W. H. SCHRADER,
Vice President and Controller.

Sworn to and subscribed before me this 25th day of September, 1958.

/s/ LORAINE C. SMITH,
Notary Public.
Mobile County, Ala.
My Commission Expires March 27, 1962.

PETITION TO IMPLEAD PAN-ATLANTIC STEAMSHIP CORPORATION UNDER THE 56TH RULE IN ADMIRALTY.

To the Honorable, the Judges of the Said Court:

The Petition of Steamship YAKA, by Waterman Steamship Corporation as her owner and claimant, to implead Pan-Atlantic Steamship Corporation under the 56th Admiralty Rule, respectfully shows to this Honorable Court as follows:

1. Libellant Elijah Reed, a longshoreman, instituted his admiralty suit against Steamship YAKA to recover damages for personal injuries allegedly sustained while he was handling cargo aboard said vessel in the port of Philadelphia on or about March 26, 1956, at which time libellant was employed by Pan-Atlantic Steamship Corporation. A true and correct copy of the libel is annexed hereto as Exhibit "A".

2. On March 26, 1956 and at all times material hereto, Steamship YAKA was under bareboat charter to Pan-Atlantic Steamship Corporation, as averred by respondent in its answer to libel, a true and correct copy of which is annexed hereto as Exhibit "B."

3. At the time of the alleged accident, the respondent vessel was under the exclusive possession, management and control of Pan-Atlantic Steamship Corporation, which furnished all appliances used by its longshoreman employees to discharge the cargo at Philadelphia for its own account, including numerous wooden pallets, one of which is alleged to have been defective so that it broke under libellant's weight and caused his injury.

4. Respondent denies that it was unseaworthy in any respect which may have caused or contributed to the alleged accident, but if it shall be otherwise determined upon

the trial of this cause, then such unseaworthy condition was directly, primarily and substantially caused by the negligence of Pan-Atlantic Steamship Corporation while performing stevedoring services for its own account, in failing to furnish its longshoreman employees with proper appliances and a safe place to work, thereby constituting a breach of its implied contractual obligation to use and operate the vessel, and in particular to perform its stevedoring services, in a safe, proper and workmanlike manner so as to avoid creating a maritime lien upon the vessel arising from injury to longshoremen injured in the course of performing such stevedoring services.

5. In the event that recovery of damages is granted to libellant against Steamship YAKA, in the premises the vessel, and Waterman Steamship Corporation as her owner and claimant, are justly entitled to full indemnity against Pan Atlantic Steamship Corporation.

6. Impleader under the 56th Admiralty Rule is necessary to avoid circuity of action, so that all issues involved may be concluded in one suit.

WHEREFORE, respondent Steamship YAKA, and Waterman Steamship Corporation as her owner and claimant, respectfully pray for leave to implead Pan-Atlantic Steamship Corporation for the purpose of asserting their right to full indemnity for any and all damages which may be awarded against the vessel in favor of the libellant.

RAWLE & HENDERSON,

By HARRISON G. KILDARE,
1910 Packard Building,
Philadelphia 2, Pa.,
Proctors for Steamship YAKA.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

Harrison G. Kildare, being duly sworn according to law, deposes and says that he is a member of the firm of Rawle & Henderson, proctors for respondent Steamship YAKA, and Waterman Steamship Corporation, her owner and claimant; that he has read the foregoing impleading petition, and that the facts therein stated are true and correct to the best of his knowledge and belief, based upon information obtained from agents, employees, representatives and records of the aforesaid claimant. This verification is made by deponent as proctor for the reason that the claimant is a foreign corporation without officers in this district.

HARRISON G. KILDARE.

Sworn to and subscribed before me this 11th day of December, 1958.

RALPH C. EVERT,
Ralph C. Evert,
Notary Public, Philadelphia, Philadelphia Co.,
My Commission Expires June 13, 1960.

PRAECIPE.

To the Clerk:

Please enter our appearance for Pan-Atlantic Steamship Corporation, the Impleaded Respondent in the above-entitled case.

KRUSEN, EVANS & SHAW,

By T. E. BYRNE, JR.,
Counsel for the Impleaded Respondent.

MOTION OF PAN-ATLANTIC STEAMSHIP CORPORATION.

The Motion of Pan-Atlantic Steamship Corporation respectfully prays that this Honorable Court shall strike the Answer of Waterman Steamship Corporation to the Libel of Elijah Reed and strike any claim which may have been claimed by Waterman Steamship Corporation alleging that it was entitled to file such claim as owner of the ship and that this court shall permit only Pan-Atlantic Steamship Corporation to file a claim for the S. S. Yaka, to file an Answer to the Libel, and to defend the within action. In support of its Motion Pan-Atlantic Steamship Corporation avers as follows:

1. As will more fully appear the Libel herein is only in rem.

2. Waterman Steamship Corporation has filed an Answer to the Libel in which it denies, inter alia, that the Steamship Yaka was within the jurisdiction of this Court and subject to attachment or service of process in the within action at all times material hereto.

3. As will further appear from the Answer of Waterman Steamship Corporation, Waterman avers that it was not in possession and/or control of S. S. Yaka at the times material to this action. Waterman, on the contrary, avers that it was an owner out of possession and that Pan-Atlantic Steamship Corporation "was at all material times acting as bareboat charterer of the said vessel, with full responsibility for her navigation, maintenance, use, loading and discharge."

4. Pan-Atlantic Steamship Corporation likewise avers that it was the bareboat charterer of the S. S. Yaka and as such was the owner *pro hac vice* and that it had the exclusive right to custody and possession of the said vessel at at times material to this action and it accordingly denies

the right of Waterman Steamship Corporation to possession of the said ship at any time material hereto and it denies the right of Waterman Steamship Corporation to file a claim for the vessel or to Answer the Libel herein on behalf of the vessel.

WHEREFORE Pan-Atlantic Steamship Corporation prays that this Honorable Court shall:

(a) Strike any claim which Waterman Steamship Corporation may have filed for the S. S. Yaka in this proceeding.

(b) Strike the Answer filed by Waterman Steamship Corporation to the Libel herein.

(c) Dismiss Waterman Steamship Corporation as a party to this action.

(d) Grant leave to Pan-Atlantic Steamship Corporation, which has already appeared in this action by a general appearance, to file a claim as the party entitled to possession of the S. S. Yaka and leave to file an Answer to the Libel herein.

(e) Stay all proceedings pending determination of this Motion.

KEUSEN, EVANS & SHAW,

By T. E. BYRNE, JR.,
Counsel for Pan-Atlantic Steamship Corporation.

OPINION SUR MOTION OF PAN-ATLANTIC TO DISMISS WATERMAN FROM THE ACTION.

Before KIRKPATRICK, *J.*

This is an action for damages for personal injuries, brought by a longshoreman. It was begun by a libel in rem against the ship, the cause of action asserted being unseaworthiness.

On the date of the alleged accident the ship was owned by Waterman Steamship Corporation but was in the exclusive possession of Pan-Atlantic Steamship Corporation under a demise charter. The libellant was an employee of Pan-Atlantic.

Waterman has entered its appearance as claimant and has filed an answer to the libel. It has also impleaded Pan-Atlantic.

Presently before the Court is a motion filed by Pan-Atlantic to (1) strike Waterman's claim for the ship (2) strike Waterman's answer (3) dismiss Waterman as a party (4) grant leave to Pan-Atlantic (which has already entered a general appearance) to file a claim and an answer to the Libel—in short, to permit only Pan-Atlantic to defend the action.

At the argument Waterman's proctor stated that it would not oppose the motion.

It is easy to see that the purpose of the motion is to put the libellant in the position of longshoreman Smith in Smith v. Mormacdale, 198 F. 2nd 849, who found himself barred, as an employee of the claimant owner in that case, from the recovery of general damages, by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., section 905.

Waterman, by entering its appearance and filing an answer, properly became a party to this proceeding. The owner of a ship which is under a demise charter at the time when the cause of action against the ship arises certainly has

an interest in the ship, subject only to the term of the charter. If an injured party recovers he can have execution against the ship and it would be unconscionable to compel the owner to leave the defense of his vessel entirely in the hands of a party who might conceivably have little or no interest in clearing it.

Having voluntarily become a party to this suit Waterman obviously may not simply withdraw. It may or may not choose to defend, but it remains in the case unless the libellant releases it. This being so, it can not accomplish what amounts to withdrawing by the maneuver of impleading a third party then acquiescing in a motion by the latter to dismiss it (Waterman) from the action.

In the Smith case, supra, there was no charter, the libellant, being an employee of the shipowner. The court held that the Longshoreman's Act could not be by-passed by adopting the device of a suit in rem against the ship. As to whether the rule of that case applies in a situation where, as here, there is a demise charter I express no opinion. The question of ultimate liability can not be raised by this indirect effort to withdraw.

The motion of Pan-Atlantic is denied except as to (d) of the prayer, which is granted.

ANSWER OF PAN-ATLANTIC STEAMSHIP CORPORATION TO THE PETITION UNDER THE 56TH ADMIRALTY RULE.

To the Honorable, the Judges of the Said Court:

The Answer of Pan-Atlantic Steamship Corporation to the Petition under the 56th Admiralty Rule respectfully alleges upon information and belief as follows:

1. Admitted.

2. Admitted.

3. Denied. Pan-Atlantic Steamship Corporation (hereinafter Pan-Atlantic), denies the third paragraph of the Petition as stated. It denies that any pallet furnished by it was defective or contributed to the injuries to the libellant in the original libel, although it admits that these are the allegations of the libellant. It admits all of the remaining averments of the third paragraph of the Petition.

4. Denied. Pan-Atlantic denies the averments of the fourth paragraph of the Petition as stated. It denies any and all allegations of negligence and/or unseaworthiness of the Steamship YAKA and it denies any breach of any contract, expressed or implied.

5. Denied. Pan-Atlantic denies, all and singular, the allegations that the S. S. YAKA was unseaworthy or that it breached any duty which it owed to the original respondent, Waterman, herein or to the original libellant.

SECOND DEFENSE.

Pan-Atlantic denies the right of Waterman Steamship Corporation to have filed a claim for the S. S. YAKA and avers that only Pan-Atlantic was entitled to the possession and control of the S. S. YAKA at all times material hereto.

WHEREFORE, Pan-Atlantic prays that the Petition impleading it under the 56th Admiralty Rule shall be dismissed, that it shall be permitted to file a claim for the S. S. YAKA; that the claim of Waterman Steamship Corporation shall be stricken and that the libel against the S. S. YAKA shall be dismissed.

KRUSEN, EVANS AND SHAW,

T. E. BYRNE, JR.,
Proctors for Impleaded Respondent Pan-Atlantic Steamship Corporation.

ANSWER AND CLAIM.

The claim of Pan-Atlantic Steamship Corporation to the SS YAKA, and its answer to the original libel against the SS YAKA, respectfully alleges upon information and belief as follows:

1. Admitted.

2. Denied. The answering respondent denies that the SS YAKA is, or at the times material hereto was, within the jurisdiction of this Honorable Court.

3. Denied. The answering respondent denies the averments of paragraph 3 of the libel as stated. It avers, on the contrary, that at all times material hereto, it was the employer of the libellant. It also avers that at all times material hereto it was the owner pro hac vice of the SS YAKA and that it was, by its agents, servants and employees, at all times in possession and control of the said vessel and was operating it for its own account.

4. Denied. The answering respondent denies the averments of the fourth paragraph of the libel as stated. It denies that the libellant was working upon a staging erected with pallets, that a pallet broke, that the libellant's foot was trapped by a draft of cargo and that he sustained injuries of the nature alleged in the libel. It admits the remaining averments of the fourth paragraph of the libel.

5. Denied. The answering respondent denies, all and singular, the allegations of unseaworthiness as they pertain to the SS YAKA.

6. Denied. The answering respondent denies the averments of the sixth paragraph of the libel.

7. Denied. The answering respondent denies the averments of the seventh paragraph of the libel. It denies that the premises are true and it denies the jurisdiction of this Honorable Court.

Further answering the libel, and as full, complete and affirmative defenses thereto, Pan-Atlantic avers as follows:

8. At all times referred to in the libel, the libellant was in the employ of Pan-Atlantic. The relationship between the two was governed by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq., and Pan-Atlantic had complied with all of the terms and conditions of the said Act, it had insured its liability thereunder and it avers that it paid or caused to be paid to the libellant all of the benefits required to be paid to him under that Act. It therefore pleads the provisions of the Act, and particularly Section 5 thereof, and avers that its exclusive liability to the libellant is pursuant to the terms of the Longshoremen's and Harbor Workers' Compensation Act.

9. The libellant was guilty of contributory negligence.

10. The libellant assumed the risks.

11. Pan-Atlantic denies the right of Waterman Steamship Corporation to file a claim to the SS YAKA and to file an answer to the libel herein, it denies the right of Waterman to possession of the SS YAKA and it avers that the proceedings herein and the manner in which Pan-Atlantic has been joined as an additional respondent is an illegal and improper attempt to deprive Pan-Atlantic of the benefits to which it is entitled under the Longshoremen's and Harbor Workers' Compensation Act.

WHEREFORE, the impleaded respondent Pan-Atlantic Steamship Corporation prays that the libel herein shall be dismissed, that it shall be awarded its costs in this proceeding and it shall have such other and further relief as may seem just to this Honorable Court in the premises.

KRUSEN, EVANS AND SHAW,

By T. E. BYRNE, JR.,
Proctors for the Impleaded Respondent—Pan-Atlantic Steamship Corporation.

ORDER.

And Now, October 12, 1959, after consideration of the discussion at the pre-trial conference held September 22, 1959, the report of such conference, and the letters from counsel of September 30, October 6, and October 7 attached to that pre-trial report, It Is Ordered that the foregoing case be tried first on the issue of liability only and that the deposition of Mr. Tattersall may be admitted in evidence in lieu of his personal testimony.

/s/ Francis L. Van Dusen, *J.*

The foregoing letters make clear that the trial on the issue of liability only will only take about 3½ days.

EXCERPTS FROM TESTIMONY.

(2) * Mr. Boardman: Your Honor, this is a libel in rem based on the unseaworthiness of the SS "Yaka," which was owned by Waterman Steamship Company and bareboat chartered to Pan-Atlantic Steamship Company, the employer of libellant. The charter was made on March 19, 1956, and ended on May 19, 1956, approximately two months. During this period, actually four days after the beginning of the charter libellant sustained his injuries while serving as a longshoreman in the No. 2 hold of the "Yaka."

* * *

(6) Mr. Kildare: Yes, if the Court please.

It is correct that at the time this accident (7) occurred, the vessel, the "Yaka," which is owned by the claimant-respondent, Waterman, was under a bareboat charter. It had been under that charter for a period of a few days. The position, therefore, of the claimant-respondent, Waterman, is that the only basis on which there can be any liability upon the vessel, and consequently upon the claimant-respondent, is that there was some condition which brought about this accident, which was present at the time that the vessel was delivered to the Pan-Atlantic Steamship Corporation under the bareboat charter several days before the accident occurred. There has never been brought to our attention up to now, sir—and I think it is important because of the fact there are two cases before you, one of which should be dismissed at this time—there has been no evidence brought to our attention that there was any indication of a cause which arose prior to the delivery of the vessel under the bareboat charter. The pallets were actually the property of Pan-Atlantic. They were brought aboard by them in connection with their work as bareboat charterer. Of

* Figures in parentheses refer to page numbers of typewritten transcript.

course, they employed the crew because it was a bareboat charter, and at the time, therefore, of the accident, we had nothing but the naked, bare title of the vessel. We had no control over her operation or use or of the officers involved. (8) I want to make that clear sir, because, as I say, there were two cases. One was brought in 1956 against Waterman Steamship Corporation. There was an opinion by Judge Kirkpatrick in connection with our motion for dismissal based on a peremptory exception to the libel. The opinion was filed on March 10, 1958, and the only basis on which Judge Kirkpatrick refused to grant the exception was that there might be some evidence brought out at the trial to the effect that the alleged defect which caused the injury arose before or after—the question was whether it arose before or after, and the question was whether or not the libellant might be able to show that the condition existed prior to delivery, and therefore the exception could not be allowed.

That was followed by two pretrial conferences before Judge VanDusen. The first of those occurred on December 11, 1958, at which time Judge VanDusen first consolidated the two cases—that is, the one in 1956 against Waterman Steamship Corporation in personam as owner of the vessel, and the one which was subsequently filed, the present one, No. 123, of 1958, against the vessel in rem—and stated this:

> "It was also agreed that unless counsel for libellant notifies counsel for the respondent within two weeks, counsel for the libellant would agree to the dismissal of the admiralty action No. 339 of 1956 at the
> (9) time the cases were called for trial, and that the case would proceed to trial on Admiralty Action No. 123 of 1958."

We were not notified within two weeks nor at any other time that there was any reason to believe that the defective pallet was part of the regular equipment of the vessel,

which it was not, or that it was aboard the ship at the time of delivery, which it was not. As a matter of fact, there was a subsequent pretrial conference before Judge Van-Dusen, at which time I felt it was very clear that counsel for libellant agreed that the action, the first suit in 1956, should be dismissed, but to my knowledge it hasn't been; is that correct?

Mr. Boardman: Your Honor, may I say for the record that we have no objection to the 339 of 1956 in personam action being dismissed.

Mr. Kildare: All right. I wanted to bring that to the Court's attention. I make that motion, and my friend does not disagree with it, so we leave that for the record.

Now, with regard to the proceeding in rem, after the libel had been filed against the vessel, the vessel was not here in this jurisdiction, but it turned up in another jurisdiction. It was about to be attached there in a (10) similar suit. In order to avoid the attachment in that other jurisdiction, we accepted service at the direction of our client, with our consent. We accepted the service of the process here. At that time we impleaded the Pan-Atlantic Steamship Corporation for the reason that I have already indicated, that if there were any unseaworthy, unsafe conditions existing at the time of the accident which brought this accident about, it was created solely by Pan-Atlantic Steamship Corporation, which was not only the charterer of the vessel, the bareboat charterer, but also did their own stevedoring and were the employer of the libellant.

Your Honor will note that there was an attempt in the form of a motion of Pan-Atlantic to strike off our answer to the libel and to substitute themselves for the Waterman Steamship Corporation as claimant of the ship, in view of the fact they were bareboat charterer, and the Court declined to do that, so we are in the position now that the action proceeds against Waterman, that is, against the ship, Waterman as claimant, and if there is any recovery against

them, then our third-party action comes before the Court from the standpoint of indemnity.

The Court: Proceed.

• • •

(11) Mr. Boardman: Mr. Byrne, of course you can speak for Pan-Atlantic, but the res is here in the light of the fact that we could have attached this vessel in Norfolk, Virginia. The libel was filed, and we have letters from Mr. Mount of Rawle and Henderson saying that they would accept service here as if the vessel were attached here, and we are suing the vessel in rem. Mr. Byrne's contention as to the indemnity factor between the bareboat character and the vessel owner, frankly, does not concern the libellant. That is a third-party factor, but the vessel is here and jurisdiction (12) is here.

• • •

LIBELLANT'S EVIDENCE.

ELIJAH REED, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Boardman:

• • •

(15) Q. Were you injured on board a vessel, Mr. Reed, or on the wharf?

A. Aboard a vessel.

Q. Do you know the name of that vessel?

A. Yes.

Q. What name was that, sir?

A. The SS "Yaka."

Q. Where was this ship docked?

A. Pier A, Port Richmond.

• • •

Q. At that time whom were you employed by?
A. Pan-Atlantic Steamship Company.
Q. Who was the gang boss?
A. Frank Mullen.

* * *

(16) Q. When you went to the No. 2 hold to start work, were the hatches on or off?
A. Hatches on.
Q. They were on?
A. Yes, hatches on.
Q. Were those hatches removed?
A. We removed the hatches and the beams going down to the lower hold.

* * *

(17) Q. When you went into the lower hold what were you to do? Unloading or discharging?
A. As we went down in the lower hold we took the hatches and beams off. We were uncovering down to the lower hold. When we got down to the lower hold, we was going to load down there in the lower hold.

* * *

(18) Q. Where were you assigned, Mr. Reed, after you finished the lower hold?
A. Come up and cover up in the tweendeck and prepare ourselves for Hershey chocolate.
Q. Is that the lower tweendeck or the upper tweendeck?
A. Lower tweendeck.

* * *

(21) Q. By the way, how did this insulating cargo come into the hold?
A. It comes in the hold by winch from the wharf, on pallets.
Q. Do you remember the condition of those pallets?
A. Remember the condition of those pallets?
Q. Yes.
A. They were old and dirty pallets.

* * *

(22) Q. How was the chocolate candy brought into the hold, this Hershey candy you are talking about?

A. It is brought on pallets by the winchman from the dock.

* * *

(24) Q. Would you explain the procedure used in getting the draft of Hershey chocolate into the hold, unloaded, and stowed by you and the men in your gang?

A. The Hershey chocolate is on the wharf or the dock on pallets. It is sitting in the doorway, as we call it. The hatch man is at the rail and gives the instructions to the deck man. The deck man—he is the winchman—he brings the candy from the dock into the ship, into the midship of the ship, and one of us down in the hold will come out, if he wants it in the inshore side or the offshore side, either one of the men will come out and instruct him to work the draft over to where we want it at.

In this instant case we had two stagings. We had a staging on the inshore side and a staging on the offshore side. So one of our men would come out and tell him to move the staging, bring the draft over to the inshore staging. (25) They would be down on the floor. I would be up on the staging and working back on the syrup, because at that time I will be passing. Then I come out to help land. So I will come out and help land. They would push and I would pull, pull on the staging. Then we would yell out, "Ease back," and the deck man, as we get out over the staging, we would holler out and he would ease the draft down. Then we would unhook the spreader, let the spreader go out, and get another draft, then proceed passing the candy back to the storers.

* * *

Q. Was the draft then landed on the deck?

A. No, stopped in the air. You stopped the draft in the air. Then you direct him and tell him how far you want it over the staging and lower it down a little bit to the

staging before the men can reach it and get it and push it in.

• • •

(26) Q. After this draft is lowered and moved over in front of the staging, the draft, I take it, is finally landed on the staging?

A. No, it is not finally landed on the staging. We have to pull it in. We have to pull it forward, because the staging is not all the way out in the square of the midship. We were working forward. Then you have to pull your draft forward to get it closer to your work where your syrup and insulated floor was. Your staging is a floor. Actually, it is a floor, so you would have to pull your draft, because your draft is not sitting directly over your staging, so you would have to push the draft and ease it back on your staging.

Q. It was your job to pull and the job of the men on the (27) deck to push?

A. That's right.

Q. Just one question about that, Mr. Reed: When the draft is finally worked over to the position in front of the staging, about how far is the draft from the edge of the staging?

A. How far the draft is from the edge of the staging?

Q. Yes.

A. About two foot forward from the staging. That is at the end of the staging. It is about two foot forward from the staging.

Q. When the draft is pulled and pushed forward onto the staging, does the entire draft land on the staging or does some stick off and some stick on?

A. Generally it lands on your staging.

• • •

(29) By Mr. Boardman:

Q. Do you know, Mr. Reed, who constructed the staging?

Mr. Byrne: Objection.

The Court: Overruled.

A. Yes, me and the other fellows who was working—the passers. After we insulate the floor we have to make a staging, because you are not even, so you make your staging even with your syrup, which is like a floor. That staging is like a floor that comes out of the hatch, where you can be even, where you can work off. So after we get it off the pier, then we make our staging before we can work on it.

Q. Mr. Reed, suppose you explain the makeup of the staging for us.

A. We have about two cases of syrup all over the floor. So you got a height there of two and a half or three feet high. So we take pallets and make a staging, which is the procedure, to use pallets. So we take a pallet. You put them flush with your syrup, get it level, then we take another set and put them level. That makes it level where you can work and don't have to jump down and drop each time the work comes out. You would be working off the level.

(30) Q. So you had two sets of pallets working athwartship, you mean from wing to wing?

A. Two sets of pallets turned athwartship.

Q. One in front of the other?

A. That's correct.

Q. How many pallets in each set?

A. About three, three in each.

Q. Take the top pallet of the staging that was used on the day in question. How was that pallet constructed?

A. Of wood and stanchions.

Q. You said of wood and stanchions. Would you describe the top layer of the pallet for us.

A. The top layer of the pallet seemed to be about a 1 by 6, about 6 inches wide, about an inch thick, or maybe inch and a half thick, and about 6 inches wide or 7 inches wide.

Q. About how many of those boards make up the top layer of the pallet?

A. A pallet is about 4 by 6, about 4 foot wide, and it is about 6 foot long, so I imagine it might be 5 or 6 of them up there.

Q. Where are these stanchions in relation to these boards?

A. Your stanchions are what you call your support. You have one on each end and one down in your center. You have top and bottom. Then you have to use boards nailed together (31) on the stanchions. You have a tier of boards on the top of your stanchions, then you have the same amount of boards or similar underneath of the stanchion. Then you have a stanchion in the middle support, you have a stanchion on the end, and you have a stanchion on this end.

Q. So it is like a sandwich with these stanchions in between as a support?

A. That's right.

Q. As near as you can remember, the boards on the top pallet were about an inch to an inch and a half thick?

A. Yes, about that.

Q. By the way, was there any space between these top boards on the pallet, Mr. Reed?

A. There is a space there about an inch or so, a space between each board.

* * *

(32) Q. By the way, these pallets that you used to make up the staging, do you know whether they came in loose, or did they come off of the insulating cargo?

A. Possibly they came off the insulating cargo. We saved the pallets for the staging.

Q. Do you know, Mr. Reed? Do you know where they came from?

A. They came from the wharf that the candy or the syrup was on.

* * *

(34) Q. This procedure that you described, the fact of lowering the draft of Hershey chocolate and insulating the

cargo and building out the staging, is this a normal procedure used, as far as you know?

A. Yes.

Q. Have you used it before?

A. Yes.

Q. And have you loaded chocolate in this manner before?

A. Yes.

Q. As a matter of fact, have you loaded chocolate aboard the "Yaka" before in this manner?

A. Yes.

Q. And had you ever received instructions to load Hershey chocolate in this manner?

A. Yes. We had the Hershey man. The Hershey chocolate is a special cargo. You have so much damage and breakage, and we try different methods. They come out and give you instruction. You get letters back, and you get special instruction how they want it loaded, and they observe to see how you load it and see is that the way they want it done.

Q. By the way, Mr. Reed, would you use staging for any other type of cargo besides chocolate?

A. Yes, in general you use staging any time you are working, because if you got a ship in which your cargo is (35) stowed out too high, where you can't work or you can't break down, or the midship or the square is open, you would have to build your staging, any cargo, general cargo, to load or discharge.

Q. Mr. Reed, what do you use to make those kinds of stagings?

A. Pallets.

* * *

Q. Now, Mr. Reed, suppose you tell us about how this accident happened, how you got hurt.

A. How I got hurt. I was working in the forward end of the No. 2 hold, forward, as a passer and help landing. We had done prepared the hatch, took the sheer out, all the

syrup and the toilet tissues in, getting ready for the candy, (36) and after we had got everything ready, had our staging all set up and ready to receive the candy, I was working in the hatch. I walked out to get the draft, help pull the draft in, land the draft. They would pass it off, I would pass it to the stowers, throw off our empty pallets, and start working.

At this particular time, the time I got hurt, I walked off the syrup out in the middle staging. A pallet board broke, and my foot went in the board, all the way down in the pallet board, and turned. As I reached for my draft going back, I turned my foot, twisted my foot, and went down, and reached up, and I hollered. As I hollered, the man easgd the draft down.

* * *

Q. How soon after you hollered did the draft land?

A. When I hollered, the man eased the draft down on me.

Q. At the time your foot got caught in the broken board and you hollered, had the draft been pushed far enough over this staging so that it was actually ready to land?

A. No, no. The draft was just about half way, because I (37) was all the way out to the end. When I stepped down and the board broke, I was just about to the end of the staging, just enough to get hold to it. Then when I fell back, twisted and fell down, the draft came down and half of the draft was sitting on my leg and half was sitting on the staging out in the midship.

Q. Was the entire draft on the stage or was half on and half off?

A. Half was on my leg, half of the staging, and half sitting clear.

* * *

(39) Q. By the way, at the time you got hurt how many men were pushing on the draft?

A. Three besides myself.

Q. What was the height of the draft in relation to your body when you stepped forward to grab it?

A. The draft was just about down about my knees.

Q. The bottom of your draft was about at your knee level?

(40) A. My knee level or a little lower.

* * *

(43) Q. Did that draft that landed on you drop like a dead weight or was it eased down?

A. It was eased down, because we pulls on it and the other fellow workers they pushes the draft. So when you push the (44) draft to get it over to steady it, you have to stay with it. So you just push the draft, and you holler, and the man eases it back down.

* * *

CROSS-EXAMINATION.

By Mr. Kildare:

Q. Now, Mr. Reed, you say that the board which broke was about an inch or an inch and a half thick; am I right?

A. Yes, sir.

Q. How long was the board?

A. The length of the pallet.

Q. How long would that be?

A. The pallet is about four foot wide and about approximately six foot long.

Q. How long?

A. About six foot long.

Q. Six foot?

A. Yes.

Q. Now, it has some thickness, doesn't it? Its vertical dimension is something?

(45) A. Stanchions, yes. You have those 4 by 4 stanchions that is constructed and your boards nailed together.

Q. Six inches high?

A. The stanchions are 4 by 4's.

Q. What is a 4 by 4?

A. It is about four inches width and four-inch depth. We call them stanchions.

Q. How big is it across the top?

A. It goes all the way the length of the pallet. You have three of them.

Q. The entire distance over the top. What would be the dimensions of the top?

A. Of the pallet?

Q. Yes.

A. Four foot wide.

• • •

(47) Q. These were constructed entirely of wood, of course?

A. Yes, sir.

Q. The thing that you stepped on and broke is what you call a pallet, isn't it?

A. Yes, sir.

Q. Is that a standard trade name of this particular device that they were using that day?

A. Yes, sir.

Q. You have seen a lot of them, have you?

A. Yes, sir.

Q. Did they have a great many in that hold at that time?

A. Working? A great many of them?

Q. Yes.

A. No, we usually send them out. You pile them out three or four or five—five is the most—and you pile them in the midship. When you finish working you stack them or pile them, four or five of them, then you send them out.

Q. Where did the pallets come from that were in No. 2 lower tweendeck at the time of your injury? Did you see where (48) they came from?

A. They come with the cargo. The cargo comes from the wharf on pallets into the ship.

Q. When did you get to the ship that day for the first time?

A. I didn't hear you.

Q. When did you first arrive at the "Yaka" that day?

A. Aboard?

Q. When did you reach the ship?

A. I reached the ship 8:00 o'clock that morning.

Q. And where were the pallets at that time?

A. On the wharf.

Q. Do you know how long after you got on the ship the pallets were brought aboard?

A. No, because when we went aboard ship we were loading. We went right on deck to the lower hold to start loading the ship.

Q. And the cargo was actually brought in on these pallets; is that it?

A. Yes, the cargo was actually brought in on the pallets.

* * *

(49) Q. Was it customary to use pallets on that work?

A. At this particular way we had it arranged, because we had the syrup on the floor, and you have to use pallets to make staging to work on the level.

Q. Did you always put up the same kind of staging?

A. Yes, the pallets.

Q. Did you always use pallets?

A. Pallets. Sometimes we use a lid top on top of the pallets.

By Mr. Byrne:

Q. Sometimes you use what?

A. Steel lids if the ship has got a steel lid. We put the pallets down and bring in a lid top to put on top of the pallets.

(50) By Mr. Kildare:

Q. Who decided on this particular day of the accident to use pallets for staging?

A. By me being an experienced longshoreman, that is the general procedure we do when we don't have a level.

When we don't have a level we automatically know you are supposed to build your staging.

* * *

(51) Q. There was nothing unusual, then, you say, in walking on these pallets with the boards an inch or an inch and a half thick?

A. No.

* * *

(54) Q. Did you look to see whether or not any one of those boards you were about to walk on might be cracked and unable to support your weight?

A. I had been working there an hour or an hour and a half, working candy on top of them. We don't take pallet for pallet and inspect it, because we usually use good pallets. If we see a broken pallet, we won't build a staging with a broken pallet. We try to use good constructed pallets to walk out on. You know, when you are working on something, you want to make it good. We wouldn't use a broken pallet, if we saw it, to make a staging.

Q. I take it you had been landing cargo on either one or both of these two top pallets for some time before the accident?

A. Yes.

Q. How long?

A. About an hour or an hour and a half.

Q. How much would each draft weight? Have you any idea?

(55) A. Approximately, a draft, I guess we would call it a swing ton, approximately up to 2,000 pounds, maybe under, but our draft runs from 2,000 pounds back.

Q. And it was that weight that was set down on these pallets? Is that what you are saying?

A. Yes, ease it down, set it down.

(57) Q. Tell me, Mr. Reed, was there any name or identification that you can recall on any of these pallets that day to show whom they might belong to or who furnished them?

A. No. I don't know. There is so much pallets, I don't know whose pallets they are.

Q. Do you know who furnished those particular pallets that day?

A. Do I know? No. The pallets come from the wharf with the cargo. The cargo gang loads it from the Hershey car boxes, and they loads the candy on the pallets and send it into the ship.

* * *

By Mr. Byrne:

* * *

(58) Q. Now, Mr. Reed, you say that you usually work for Luckenbach?

A. Yes, sir.

Q. And that is Luckenbach Steamship Company?

A. Yes, sir.

Q. And the date that this accident happened you were working for Pan-Atlantic Steamship Company?

A. Yes, sir.

Q. In your occupation there you are not a member of the crew at all?

A. No, sir, longshoreman.

Q. You are a longshoreman. On this cargo that was being loaded the day that this accident happened, men working on the wharf had taken the cargo out of refrigerated railroad cars; is that right?

(59) A. Yes, sir.

Q. And had placed the cartons onto these wooden pallets?

A. Yes, sir.

Q. When they move these wooden pallets piled up with cartons on the wharf, they use a fork-lift truck, do they not?

A. Yes, sir.

Q. Am I not correct when I say that this pallet is so constructed, with space between the boards at the top and the boards at the bottom, so that the two prongs on this fork-

lift truck can insert themselves there and pick this loaded up and cart it around the pier?

A. Yes, sir.

Q. On this occasion they were not using the fork-lift truck on this ship, were they?

A. No, sir.

Q. Now, Mr. Reed, the pile of pallets you have testified was there, and upon which the drafts were coming in, and those drafts that were coming in were on pallets as well, were they not?

A. Yes, sir.

Q. Now, Mr. Reed, the pile of pallets you have testified was there and upon which the drafts were coming in, those drafts that were coming in were on pallets as well, were they (60) not?

A. Yes, sir.

* * *

Q. You men had piled these pallets there, had you not?

A. We made a staging. Before we started working we made a staging. Now, the pallets that we piled is the pallets that you discharged the candy off. That is the pallets. When you say pile of pallets, after we discharged the candy off the pallets, the empty pallet, we piled it up, four or five of them, and sends it back off the ship. Instead of taking each time, they don't take one and bring one. You have to pile (61) them up four or five and send them out.

Q. Mr. Reed, this thing that you call a staging today is nothing more nor less than three pallets piled one on top of the other?

A. That's right, two tiers of three pallets, just plain pallet boards.

Q. And you men had put that there; is that right?

A. Yes, sir.

Q. And the reason you put it there was because it was easier for you and it avoided the necessity of picking this cargo up and then going up a couple of feet in order to stow it; is that right?

A. No. The purpose of staging is generally we used to keep yourself level, work off the level, and to get the draft pushed closer, not for just keep them lifted up. Any time we work up we usually make a staging. Any cargo you work you make a staging.

Q. But it is for the convenience of the men?

A. It is for the convenience of the working condition. It is not always for the convenience of the men. It is convenient for the working condition and it is convenient for the men, too. To make a staging sometimes you have a cargo built on a ship seven to eight feet high, you have to go on top of it.

(62) Mr. Byrne: I am going to move to strike your answer.

The Court: Read the question and the answer.

(The reporter read as follows:)

"Q. But it is for the convenience of the men?

"A. It is for the convenience of the working condition. It is not always for the convenience of the men. It is convenient for the working condition and it is convenient for the men too. To make a staging sometimes you have a cargo built on a ship seven to eight feet high, you have to go on top of it."

Mr. Byrne: I move to strike so much of the answer beginning with the word "sometimes."

The Court: All right. I think the question was answered before that.

By Mr. Byrne:

Q. Mr. Reed, when you went to the lower tweendeck of the "Yaka" on the day of your accident, there was no pile of pallets there, was there?

A. No. The ship was covered up.

Q. And the pallets that were used to pile up, to make what you have called a staging, were pallets that had come

in with cargo on them, and that was the cargo you used to fill up the (63) sides and fill up the bottom; is that right?

A. It possibly might have been.

Q. Now, Mr. Reed, after this accident you received workmen's compensation?

A. Yes.

* * *

Q. And your medical expenses were paid?

A. Yes, sir.

Q. Do you know who paid the workmen's compensation and who paid the medical expenses?

A. The insurance company.

Q. Mr. Reed, you testified, with respect to this cargo of chocolate, that you had special instructions. You got those special instructions from Pan-Atlantic Steamship Company, did you not?

(64) A. I got it from my foreman.

Q. From your foreman?

A. Yes.

Q. And he worked for Pan-Atlantic?

A. Yes, he is a foreman.

* * *

(74) RE-DIRECT EXAMINATION.

By Mr. Boardman:

* * *

(75) Q. Did he say he was from Pan-Atlantic Steamship Company?

A. No, he said he was from the insurance company.

Q. Your compensation company, is that what you mean, the compensation insurance company?

A. Yes, where I received my check from.

* * *

(83) Q. Mr. Byrne in cross-examination mentioned a fork-lift (84) truck. Did you at any time receive any orders, as far as you know, to use a fork-lift truck in the hold for loading or lifting the pallets of chocolate?

A. No.

Q. Did you ever use fork lifts in the hold to load chocolate?

A. No, not to load chocolate. I have used fork lifts in the hold to load different cargo.

Q. What type of cargo?

A. We will use fork lift in bands, palletized freight, storing steel and real heavy freight.

Q. This cocolate came in on pallets. What do you mean by palletized freight?

A. Palletized freight is when cargo comes in on the ship from the dock already on the pallets, in a band or casing, so she stays with the pallet. Then you use it as a truck to store it on the ship.

* * *

(85) LYDE MASON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Boardman:

* * *

(89) Q. Would the entire draft be landed on the staging or would it be some on and some off?

A. It would be on the whole staging if you landed right.

* * *

(91) Q. For example, was the draft all the way over the staging?

A. Well, half of it was over the staging and the other half was on his leg.

Q. That would put the entire draft on the staging. Was the entire draft on the staging when it landed on his leg or was it half on and half off?

A. Half on and half off.

* * *

(94) CROSS-EXAMINATION.

By Mr. Kildare:

* * *

(96) Q. Did you yourself see these pallets on the dock as you came aboard that morning?

A. No, sir, but the can stuff was on it. I didn't pay it no attention. To tell you the truth, to pay strict attention to no special pallets, I didn't do that.

Q. But the cargo did come aboard on these pallets?

A. On these pallets, yes.

Q. None of these pallets were there when you came on the ship, were they?

A. No, sir. We use them as the cargo come in.

* * *

(97) Q. Weren't the pallets that you had on the "Yaka" this day the same type of pallets that you generally used?

A. Yes, sir.

Q. They were the same size and construction?

A. Same size.

* * *

(100) Q. Did you have anything across the top of the pallets as you set them up?

A. No, sir, we don't usually use no—I know what you mean. You are talking about dunnage. You know, like you put across the hatches—I mean across the pallets. I know what you are talking about. I seen people have done that. Of course, we don't hardly use them. We don't hardly use that that way on the work.

* * *

(101) Q. And you didn't put any dunnage or any hatch board or anything across the top?

A. No, sir, not a thing across the top.

Q. You have seen that done, haven't you?

A. I have seen it done, but we don't hardly use nothing like that. Not where I work at they don't use nothing like that. Where I work at they don't use that.

They use hatch board—not hatch board. I mean what I say to make the staging out of, that's what they use. They don't go to work and use nothing to put on top of that. That is, you know, dunnage itself.

* * *

(102) Q. Did you see anybody else walking on this particular pallet before the accident?

A. Well, different ones jumping up and down. I don't watch them closely. Mr. Reed, he was coming in and out there.

Q. How many people did you see jumping up and down on that pallet before the accident?

A. Actually jumping up and down like you walk up and step down, something like that. I don't mean jumping up and down. I don't mean that way.

Q. How much do you weigh?

A. I weigh around about 220.

* * *

(103) Q. How big was each draft? Can you give us an idea of the weight of it?

A. The best I can tell you, I expect it was three high, five or six long, and three wide. Three high this way, three wide this way, and about five or six this way.

Q. Well, about how much would that weigh?

A. I wouldn't know, to tell you the truth.

Q. Was it a heavy weight?

A. Yes, sir.

* * *

(105) By Mr. Byrne:

Q. Mr. Mason, do you agree with the description that has been testified to here that a pallet has boards on the top and the bottom that are about each an inch or approximately an inch thick and that they are separated by 4 by 4's?

A. Yes.

(106) Q. So that when you say his foot went all the way down into the pallets, you mean it went down about four inches?

A. Well, something like that.

Q. Now, did I understand you to say that the pallets that you fellows piled up to make what you have called a staging were the pallets that brought in the candy stuff which you used to start off, in other words, to make the first layer, in this cargo of stowage you were going to load?

A. You mean the syrup?

Q. Yes.

A. Yes, the syrup came in on these pallets.

Q. And this pile of pallets was three pallets high; is that right?

A. Yes.

Q. And there were no pallets in the hold when you fellows first went in there?

A. No, sir.

Q. They all came in from the wharf?

A. That's right.

* * *

(114) The Court: Reed is an employee of Pan-Atlantic. Pan-Atlantic bareboat charters the vessel, which makes it, in all respects except legal title, its owner. Reed is working for Pan-Atlantic. Reed's employer—taking everything in your favor at this point—puts aboard a defective appliance, which the ship may or may not have adopted. It couldn't help itself, because there is no testimony that there was anybody operating within that area that belonged to the ship personnel. We can assume, as was testified, that only employees of Pan-Atlantic were around. As an employee of Pan-Atlantic he can do nothing further than get compensation under the Harbor and Longshoremen's Compensation Act.

So the ship is sued. There is a libel in rem, with the owner, the bareboat charterer, appearing claiming the vessel and impleading Reed's employer. Is that the present status of the case?

Mr. Boardman: It was the owner, Waterman, who impleaded the bareboat charterer. The bareboat charterer was Pan-Atlantic. Waterman was the owner.

The Court: So that is the situation now.

Mr. Boardman: In other words, there is a difference. There is one owner and one bareboat charterer employer. As far as the ship's personnel are concerned, the (115) ship's personnel were actually employed by Pan-Atlantic, the charterer, so they were in and around the area.

* * *

(118) The Court: Well, Judge Kirkpatrick said the question to be decided, and apparently by me, is whether Smith v. Mormacdale is applicable to this situation.

Mr. Byrne: Sir, I don't think that the record is quite complete here.

(119) The Court: You don't think it is quite complete?

Mr. Byrne: No, sir. I don't think that the bareboat charter is actually in evidence because, as I understand it, Mr. Boardman offered only a paragraph of it.

The Court: Well, as far as I am concerned, it is all in evidence.

Mr. Byrne: Before Your Honor closes, may I have the opportunity to offer in evidence a deposition which has been taken in this case and filed, and I have a witness whom I will make an offer of proof on, who

is present in court. I would like to offer in evidence the deposition of John Tattersall.

The Court: Which merely identifies the bareboat charter?

Mr. Byrne: And also speaks of pallets, I believe.

Mr. Kildare: Yes, if the Court please, you will find there that the witness does make it clear, from his point of view as an officer dealing with these cases and these methods, that the pallets were never part of the equipment of the ship. They were always brought on as the equipment of the stevedoring company.

Mr. Byrne: Mr. Boardman, I have in court Mr. (120) Lynwood Harris, who on the date of this accident was the chief officer of the "Yaka." I will make an offer of proof. Perhaps we can shorten matters. If called, Mr. Harris would testify that he was an employee of Pan-Atlantic Steamship Company, that the vessel as a vessel did not at any time have or carry with it pallets, that the pallets which were being used by these longshoremen were in fact owned by Pan-Atlantic but were used by its stevedoring division, as opposed to its steamship operation division.

That is the extent of my offer. I will call him if you wish.

Mr. Boardman: I will admit that. I will admit what you said to be true. That is why we dismissed the in personam action, Mr. Byrne, because we don't object to the fact that the pallets were brought on the vessel.

* * *

EXCERPTS FROM DEPOSITION OF J. C. TATTERSALL.

(2) JOHN C. TATTERSALL, having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Kildare:

Q. What is your full name?

A. John C. Tattersall.

Q. What is your present residence address?

A. 928 Turner Avenue, Drexel Hill, Pennsylvania.

(3) Q. Where is your place of business?

A. Pan-Atlantic Steamship Corporation, Foot of Doremus Avenue, Newark, New Jersey.

Q. Is it your present intention to change your residence?

A. Officially, as soon as I can find a house, yes.

Q. What is our present position with the Pan-Atlantic Steamship Corporation?

A. Vice-President, Personnel and Industrial Relations.

Q. Now, Mr. Tattersall, in March, 1956, by whom were you employed?

A. Waterman Steamship Corporation.

Q. Where did you have your office?

A. 12 South 12th Street, Philadelphia.

Q. Prior to March, 1956, how long had you been working for Waterman Steamship Corporation?

A. About sixteen years.

Q. What was your position with the company during that time?

A. Well, from 1948 to 1956—at the time I was District Manager of Philadelphia. Prior to that time I had been District Manager in Boston, from 1946 to 1948, and before that I was in New York, in the New (4) York office.

Q. With respect to March of 1956, when you were District Manager in Philadelphia, what were your duties for the company?

A. General Administrative, and Operating Supervision, including the activity in connection with any agency work that we did, and general supervision of our pier activity, stevedoring activity.

Q. What was the business of Waterman Steamship Corporation at that time?

A. Ocean transportation.

Q. In other words, ships which——

A. Ships in general.

Q. —came to Philadelphia?

A. Ships came to Philadelphia in general trades, loaded and discharged here.

Q. Can you tell us whether it was part of your responsibility as District Manager to know what arrangements with respect to chartering such vessels there might exist at the time they came to Philadelphia?

A. Yes. I would have to know the background of a charter, to know the procedure we should follow in connection with the particular vessel we might be handling.

(5) Q. Are you familiar with the Steamship "Yaka"?

A. Yes.

Q. Do you know her owner in March, 1956?

A. Waterman Steamship Corporation.

Q. Do you recall, Mr. Tattersall, whether the "Yaka' was in Philadelphia on or about March 23, 1956?

A. She was.

Q. Do you know whether she was under a charter at that time?

A. She was chartered to Pan-Atlantic Steamship Corporation, to engage in our intercoastal Arrow Line trade, which was a trade owned by Pan-Atlantic Steamship Corporation.

Q. Now, Mr. Tattersall, let me show you a paper and ask you whether you can tell me what it is?

* * *

A. This is a charter entered into between Waterman Steamship Corporation and Pan-Atlantic Steamship Cor-

poration, whereby the Steamship "Yaka" was bareboat chartered by Waterman to Pan-Atlantic as of March 19, 1956, (6) for an indeterminate period.

Q. Do you know whether that particular charter party was in effect on March 23, 1956?

A. It was.

Q. Do you know when the vessel was actually delivered under that bareboat charter?

A. It was delivered the same day while the ship was in drydock at Baltimore.

Q. What day?

A. March 19, 1956.

* * *

(7) Q. Can you tell us whether Pan-Atlantic Steamship Corporation has a home office, to your knowledge?

A. It does.

Q. Where is it located?

A. New York, New York.

Q. Do you have any personal knowledge as to the State of its incorporation?

A. Yes. It is a Delaware corporation. I think it was incorporated about 1933.

Q. Now, do you know where the home office of Waterman Steamship Corporation is located?

A. Mobile, Alabama.

(8) Q. Do you know its State of incorporation?

A. Alabama, 1919, I think.

Q. Now, Mr. Tattersall, do you know whether any appliances known as pallets were involved in loading the Hershey Chocolate on the "Yaka"?

A. Yes, pallets would have been used on Hershey Chocolate, as well as on all other general cargo.

Q. Who supplied those pallets?

A. Stevedoring, Pan-Atlantic Steamship Corporation.

Q. Did the S. S. "Yaka" have any such pallets as part of her regular equipment that she carried on the ship?

A. No.

* * *

(9) CROSS-EXAMINATION.

By Mr. Boardman:

Q. Mr. Tattersall, when the "Yaka" was taken on charter, was any personal inspection made of the vessel by yourself?

A. No.

Q. By anyone under your control?

A. No, not under my control.

Q. Or under your supervision?

A. No.

Q. Do you know personally whether any inspection was made by any employee, responsible employee, of the Waterman Steamship Corporation prior to the turning over of the "Yaka" to Pan-Atlantic?

A. I don't know.

Q. So you don't know whether or not any pallets were on that vessel at that time, do you?

A. Oh, I know there were no pallets on the ship.

Q. Why do you say that?

A. Because the ship wouldn't have any. In other words, it is not part of the ship's equipment to have pallets.

Q. Where is the Philadelphia Office of Pan-Atlantic Steamship Corporation?

(10) A. 12 South Twelfth.

Q. And of Waterman Steamship Corporation?

A. Waterman has no office here.

* * *

(12) By Mr. Green:

Q. Just one question, sir.

In your experience, have you ever encountered a situation wherein a vessel carried pallets as part of its equipment?

A. No.

* * *

EXCERPTS FROM BAREBOAT CHARTER.

(Clause 17 York-Antwerp 1950 Revised, 3/20/51)

Description of vessel.

THIS CHARTER PARTY, made and concluded in the City of Mobile, Alabama on the 19th day of March, 1956, between Waterman Steamship Corporation owner of the good American vessel YAKA, provided with proper certificate for hull and machinery and classed American Bureau of Shipping, of about 10,320 tons deadweight, or thereabouts, on summer freeboard, inclusive of bunkers and stores, and

Charterer.

Pan-Atlantic Steamship Corporation, Charterer,

WITNESSETH: The Owner agrees to let and Charterer agrees to hire said vessel from the time of delivery for a

Period.

period of about on the following terms and conditions:

Port of delivery.

1. The vessel shall be delivered to the Charterer at the port of Baltimore, and being on her delivery tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, and equipped, and in every respect seaworthy and in good running order, condition, and repair so far as the exercise of due diligence can make her. The delivery to the

Acceptance.

Charterer of said vessel and the acceptance of said vessel by the Charterer shall constitute a full performance by the Owner of all of the Owner's obligations hereunder, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any representations or warranties expressed or implied, with respect to said vessel, but the Owner shall be responsible for repairs or renewals occasioned by latent defects in the vessel, her machinery or appurtenances, existing at the time of delivery under the Charter, which defects are not discovered on the survey.

Time for delivery. Cancellation date.

2. If required by the Charterer, time not to commence before 12:01 A. M. March 19, 1956, and should vessel not be ready for delivery on or before 12:01 A. M. March 19, 1956, Charterer, or his agent, to have the option of cancelling this charter; such option to be declared by noon of the following day, and if not so declared Charter to be considered in force.

• • •

Charterer to provide.

5. The Charterer shall, at its own expense, man, operate, victual, fuel, and supply the vessel, the Master and Chief Engineer, however, to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of the Master or Chief Engineer if it shall have reason to be dissatisfied. So far as reasonably practicable, the crew to be employed by the Charterer shall be American citizens.

6. The Charterer shall pay all port charges, pilotage, and all other costs and expenses incident to the use and operation of the vessel.

Maintenance.

7. The Charterer shall, at its own expense, keep the said vessel in good running order and condition and in substantially the same condition as when received from Owner and have her regularly overhauled and repaired when necessary. Vessel shall be dry-docked, cleaned, and painted by the Charterer as may be necessary, but at least once in every nine calendar months from date of Charter.

• • •

Libels.

30. The Charterer shall indemnify and hold harmless the Owner against any liens of whatsoever nature upon said vessel and against any claims against the Owner arising out of the operation of said vessel by the Charterer, or out of any act or neglect of the Charterer in relation to said vessel, except in so far as such liens or claims arise out of any matter covered by the insurance provided herein. If a libel

should be filed against said vessel, or if said vessel is otherwise levied against or taken into custody by virtue of legal proceedings in any court because of any such lien or claim, the Charterer shall within fifteen (15) days thereof cause the said vessel to be released and the lien to be discharged. This clause shall not in any way authorize the creation of any liens against the vessel or in any way affect or impair the provisions of Clause 13 of this Charter.

• • •

WATERMAN STEAMSHIP CORPORATION (OWNERS)

By W. C. KELLY

Witness: EMMA L. DREY

PAN-ATLANTIC STEAMSHIP CORPORATION
Charterer.

By S. W. BEAUVAIS

Witness: ROSALIE S. PARSLAW

OPINION SUR PLEADINGS AND PROOF.

(As amended by Order of May 4, 1960.)

CLARY, *J.* April 29, 1960

This is a libel *in rem* against the S. S. "Yaka" to recover for injuries sustained by the libellant on March 23rd, 1956, while employed as a longshoreman on board that vessel. From the pleadings and proof, the Court makes the following

FINDINGS OF FACT.

1. The Court has jurisdiction of the parties and the subject matter of this proceeding.

2. Libellant is a citizen and resident of the Commonwealth of Pennsylvania and at all times mentioned herein was employed as a longshoreman by the Pan-Atlantic Steamship Corporation (hereinafter known as "Pan-Atlantic") to assist in the loading and unloading of cargo aboard the S. S. "Yaka".

3. On March 19th, 1956, Waterman Steamship Corporation (hereinafter known as "Waterman"), as owner of the S. S. "Yaka" had delivered that vessel to Pan-Atlantic under a written bare boat charter.

4. As part of the charter agreement, Pan-Atlantic agreed to indemnify and hold harmless Waterman against any liens of whatsoever nature and against any claims arising out of the operation of the vessel by Pan-Atlantic or out of any act or neglect of Pan-Atlantic in relation to the vessel.

5. On March 23rd, 1956, the S. S. "Yaka" was in possession and control of Pan-Atlantic under the terms of the said bare boat charter, and was lying in navigable waters at Pier A, Port Richmond, Philadelphia, Pennsylvania.

6. On that day Pan-Atlantic undertook to load a cargo of chocolate in cans and cartons aboard the vessel.

7. It provided its own facilities and longshoremen for the loading.

8. Libellant was one of these longshoremen assigned to stow the said chocolate in No. 2 lower 'tween deck of the S. S. "Yaka".

9. At about 2 P. M. on March 23rd, 1956, libellant and other longshoremen laid a floor of the cases of chocolate syrup to act as insulation for the chocolate candy.

10. Cases of chocolate syrup were, therefore, stowed on the deck of the 'tween deck about 2½ feet high in the forward end of the hatch and in the wings.

11. The hatch square of the 'tween deck contained no cargo.

12. The cartons of chocolate candy were then brought aboard on wooden pallets, using ship's winches, and lowered into the hold where the individual cartons were to be removed and stowed by hand.

13. The wooden pallets or cargo trays were constructed of strips of boards approximately an inch thick nailed to blocks at each end and reinforced at the corners, making a hollow rectangular pallet about 4 feet wide, 6 feet long and 4 inches high. Pallets of this type are commonly used for loading cargo in the Port of Philadelphia.

14. These particular pallets belonged to Pan-Atlantic Steamship Corporation.

15. Certain of these pallets were used to make up a staging or platform equal in height to the cases of chocolate used for insulating, so that the drafts of chocolate could be landed at a height equal to the top of the insulating cargo and were thus more easily and quickly stowed.

16. The use of such pallets in this way was the customary, accepted and proper practice when loading cargo of this nature.

17. The pallets used were old and dirty in appearance but were apparently adequate for the purpose.

18. As the draft of chocolate would be let down into the square of the hatch by the winch, it would be grabbed by three longshoremen and steadied above the deck.

19. One of these longshoremen would then give the winchman instructions to move the draft inshore toward the staging.

20. When the draft was in front of the staging, and still suspended in the air, the three longshoremen would push the draft over the staging.

21. At this point, libellant, who was standing on the staging area, would come forward and assist the other three longshoremen by pulling the draft onto the staging, while they pushed it forward.

22. When the draft was so suspended over the staging, it was the practice for any one of these four longshoremen to yell up to the winchman to lower the draft onto the staging, since he was not in a position to see the draft from on top deck.

23. At this signal, the winchman lowered the draft upon the staging and the four longshoremen would then unload and stow the chocolate by hand.

24. The operation was thereafter repeated until loading was complete.

25. The operation described, including the use of the pallets for staging, was the usual, customary, proper and accepted practice used in loading cartons of Hershey chocolate candy.

26. At approximately 4:30 P. M., after the staging had been in place and use for more than one hour, a draft came down into the square of the hatch and was moved in front of the inshore staging.

27. The three longshoremen pushed the draft over to the staging.

28. The libellant walked out on the staging in order to grab the draft, and did in fact have his hand on the draft in anticipation of pulling it back on the staging.

29. At that moment one of the facing boards of the top pallet of the staging upon which libellant was standing broke, and libellant's right foot fell through onto the boards of the pallet underneath.

30. His foot twisted and became entrapped in the pallet.

31. The pain in his foot caused him to let out a yell.

32. The winchman, hearing the yell and supposing it to be a signal to him, landed the draft in accordance with his prior practice.

33. The draft landed on libellant, throwing him down onto the pallet.

34. The draft was soon removed from libellant.

35. Only that board of the pallet through which libellant's foot had fallen was broken.

36. After the draft was removed it was necessary for libellant's foot to be pried out of the broken pallet by the use of a crowbar.

37. Libellant was removed from the hold and taken to Northeastern Hospital for treatment.

38. The pallet which broke contained a latent defect, which defect existed when the pallet was brought onto the ship.

39. Libellant was not guilty of any negligence in this loading operation.

40. The sole cause of this injury was the latent defect in this wooden pallet being used for staging.

41. The S. S. "Yaka" was unseaworthy.

42. This unseaworthiness caused the injury to libellant.

43. Libellant sustained personal injuries for which he is entitled to be compensated.

DISCUSSION.

As pointed out by counsel, the facts of this case are simple, but they nevertheless present two important questions of admiralty law. The first question we will take up is: Did the presence of the defect in the pallet being used by the longshoremen in the hold of the S. S. "Yaka" for staging render that ship unseaworthy?

THE QUESTION OF UNSEAWORTHINESS.

The development of the doctrine of unseaworthiness has been left entirely to the courts rather than to the legislature. Whether the result is a happy one is at least debateable.[1] There has been some uncertainty as to what constitutes unseaworthiness and at times it is difficult to discover the essential factors which a district court should look to when asked to resolve this issue. Since it is not our task to remake the law in this area, but only to resolve it within the narrow limits of the case at hand, we simply examine those few cases close in point, to determine which are controlling here. If there appears to be a conflict in the law after our opinion, the parties of course have recourse to a higher tribunal than our own to resolve it.

There are at least two recent cases whose holding clearly encompass the present situation. The first is *Con-*

1. See for instance *DiSalvo v. Cunard Steamship Co.*, 171 F. Supp. 813 (S. D. N. Y. 1959).

sidine v. Black Diamond Steamship Corp., 163 F. Supp 107 (D. Mass. 1958). There a longshoreman was injured by a defective "chisel truck", a hydraulically-operated truck with a platformed device for handling heavy bales, etc., which was property of the stevedoring firm and expressly found not to be part of the ship's regular equipment. The District Court held that a defect in this truck caused the ship to be unseaworthy, relying upon several recent Supreme Court opinions (hereinafter discussed). The second case is *DiSalvo v. Cunard Steamship Co.*, 171 F. Supp. 813 (S. D. N. Y. 1959). There it was held that a passenger baggage chute (which was regularly stored on the dock and was not kept on the ship at all) when improperly attached to the ship, so as to cause injury to a longshoreman while unloading baggage, rendered the ship unseaworthy.

Moreover there are two cases in our own District which, although they do not go as far as the above cases, are nevertheless indistinguishable in principle from the present case. In *Litwinowicz and Matyas v. Weyerhaeuser Steamship Co.*, 179 F. Supp. 812 (E. D. Pa. 1959), Judge Kraft held that where a longshoreman was injured while loading steel beams as a result of a defective "Baltimore dog" (i.e., an "L" shaped device supplied by the stevedoring firm and attached to a hook at the end of the ship's cable, to be used to break out the steel beams), he could recover for unseaworthiness. Also in *DeVan v. Pennsylvania R. R. Co.*, 167 F. Supp. 337 (E. D. Pa. 1958), Judge Van Dusen held that where a longshoreman was injured as a result of a cargo hook which had been supplied by the stevedoring firm (and which proved to be unfit for the purpose for which it was used), he could recover for unseaworthiness.

Finally, there are two recent Supreme Court cases which held that where equipment which was supplied by the stevedoring firm for performing the ship's work proves incapable of performing its function and, as a result, causes an injury to a longshoreman, the ship is liable for unsea-

worthiness. *Rogers v. United States Lines*, 347 U. S. 984 (1954), *reversing* 205 F. 2d 57 (3rd Cir. 1953); *Alaska Steamship Co., Inc. v. Petterson*, 347 U. S. 396 (1954), affirming 205 F. 2d 478 (9th Cir. 1953). In the *Rogers* case the longshoreman was injured by a defective land fall runner, supplied by the stevedoring firm and operated by one of its men; while in the *Petterson* case the longshoreman was injured by a defective block which had been brought on board the ship by the stevedoring company for use in loading the ship.

The respondents attempt to distinguish several of these opinions and also affirmatively rely upon the case of *Brabazon v. Belships, Inc.*, 202 F. 2d 904 (3rd Cir. 1953).[2] Although the Court is not persuaded by either their attempt to distinguish libellant's authority or their reliance upon the *Brabazon* case, we will briefly discuss their position on each of these cases.

First, they attack the *Considine* case, *supra*, as having been improperly decided in apparent reliance upon a case which was later reversed by the Supreme Court. *Halecki v. United New York Pilots, etc.*, 358 U. S. 613 (1958). The *Halecki* case was not the principal case relied upon by Judge Aldrich, if indeed he relied upon it at all.[3] Moreover the reasoning upon which the Supreme Court based its reversal of the *Halecki* case has no bearing upon the facts of the *Considine* case. The work being performed by the longshoreman in the former was expressly stated to be "in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment —portable blowers, air hoses, gas masks, and tanks of car-

2. Neither party cited the *DiSalvo* case or the *Rogers* case.

3. For authority, Judge Aldrich first cited the *Alaska Steamship Co.* case and then the *Rogers* case. Following the latter appeared the notation "Cf." followed by the *Halecki* case. Thus, rather than rely upon the *Halecki* case, as contended by respondent, it appears he cited it as possible contrary authority.

bon titrachloride, all brought aboard the vessel for this special purpose, *and none connected with a ship's seagoing operations.*" at page 617. (Emphasis added.) In the *Considine* case, on the contrary, the work being performed was loading of cargo—work traditionally done by a seaman. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946). The object being used was a chisel lift, special equipment only in the sense that it may have been specially designed to load cargo. We think respondent's attempt to distinguish the *Considine* case is completely without merit.

Turning to the two recent cases in our own District, the respondents have little to say except that in the *Litwinowicz and Matyas* case, "the device there was owned by the stevedore and had been attached to and incorporated into the ship's cargo handling gear." The cargo hook or the "Baltimore dog" was no more *incorporated* into the ship than the staging in our own case. In each instance, the object which proved defective was being used on the ship to perform a function traditionally performed by a ship's crewmen (i.e., loading). A specific finding of fact in our own case is that the use of pallet boards for a staging in the manner described "was the usual, customary, proper and acceptable practice . . . [for] loading cartons of Hershey chocolate candy." Unless we are to attach some special significance to the fact that the "hook" and the "Baltimore dog" were physically attached to a piece of a ship's equipment, while the pallets were merely resting upon the hold of the ship, the Court can see no logical distinction between these cases.

Finally, in an effort to distinguish the Supreme Court's holding in the *Petterson* case, the respondent stresses the following factors: (1) there was no evidence as to whether the particular block was property of the shipowner or the stevedore; (2) it was of the type and kind usually composing ship's gear; and (3) its incorporation into the ship's regular cargo handling gear made it an "appurtenance" of the ship and rendered the shipowner in that case liable

in the same way he would have been liable had title to this particular piece of equipment been traced to the shipowner. These factors differ from those in our case and are therefore not controlling.

That the block was "incorporated" into the ship's gear is a conclusion and is of no help in answering the question before us. Why was the block "incorporated" into the ship's regular cargo handling gear and the staging not? The only answer offered by respondent would seem to be that the block (1) *may* have been property of the shipowner, and (2) it was the type and kind of equipment *usually* composing ship's gear. Reliance upon these factors seems to overlook the basic rationale upon which the courts have developed the right of a longshoreman to recover for unseaworthiness. That is, they view him as a seaman when he is engaged in loading the ship's cargo—work traditionally performed by a seaman. *Seas Shipping Co. v. Sieracki, supra.* If the seaman traditionally performed the task of loading this cargo, it was the ship which presumably supplied him with materials necessary to accomplish this task. In other words, the law in this area logically negates the concept of an independent contractor performing the task of unloading. To inject such a third person into the picture, for the purpose of determining today what equipment does not belong to the shipowner or is not part of his standard gear, in order to resolve the issue of seaworthiness, is incongruous.

Although this would appear to be a logical conclusion, perhaps nowhere in the law is one less justified to rest assured in logic than in the area under discussion. Nevertheless we can do no more than rely upon precedent, when that precedent is distinguished solely by factors which we feel have no logical significance to the issue at hand.

We have purposely left until last the case of *Brabazon v. Belships, Inc., supra,* the only affirmative authority relied upon by the respondents on this point. A small part of that opinion dealt with the question of whether the par-

ticular plank which caused the accident rendered the ship unseaworthy.[4] The Court reached the conclusion that it did not (although it allowed recovery on other grounds) and in a sentence pointed up the factors which apparently influenced its decision, i.e., "The unknown source of the board, its transitory placement and its lack of any characteristic adapting it for particular shipboard use or differentiating it from other miscellaneous lumber all combine to require the conclusion that the object was not an 'appurtenance' of the ship as that term is used in connection with the shipowner's special responsibility for seaworthiness of ship's gear and appliances." at page 908. None of these factors are present here.

The defective pallet came from the stevedore and as we mentioned above, we see no reason why this fact should preclude a finding of unseaworthiness, since, for the purposes of recovery, the law views the longshoreman as a member of the ship's crew—necessarily negating the concept of a third party (independent stevedore) supplying the gear and appliances ordinarily used to stow cargo.

Furthermore we are not dealing with a "transitory placement" in our case. The pallet was intentionally placed upon the floor of the hold by the longshoreman at the beginning of their loading operation. It had been there for over an hour prior to the time of the accident. It would necessarily remain there until completion of the loading operation, since its use there was the usual, customary, proper and acceptable practice for loading cartons of Hershey chocolate. It was no more transitory than the cargo hook in the *De Van* case or the "Baltimore dog" in the *Litwinowicz and Matyas* case.

Finally, this pallet did have characteristics which made it adaptable for loading the particular type cargo involved on the ship. This is borne out by the fact that the longshoremen regularly used these pallets in just this way when

4. The case dealt primarily with the question of negligence on the part of the shipowner.

loading this type cargo. They did not on one occasion use pallets and on another use dunnage or hatchboards or other wood. The pallets were placed there intentionally to fulfill a need—just as the cargo hook or "Baltimore dog" fulfilled a need. To the extent they were so placed—and were not merely thrown down for a moments use—they became an appurtenance of the S. S. "Yaka" and rendered that ship *pro tanto* unseaworthy.[5]

THE QUESTION OF LIABILITY IN REM.

We turn then to the second question of law in this case, which both parties agree has never been decided in the Third Circuit. The question simply stated is: May a stevedore employed by a bare boat charterer maintain an action *in rem* against the vessel to recover damages for personal injuries caused by unseaworthiness which arose *after* the ship was surrendered to the bare boat charterer?

The First Circuit in *Vitozi v. Balboa Shipping Company*, 163 F. 2d 286 (1st Cir. 1947) held that a stevedore, in an *in personam* action based upon unseaworthiness which allegedly existed at the time of demise, could not recover from the real owner of the ship when the injury occurred while the ship was in the possession and control of the charterer. The basis of Circuit Judge Woodbury's opinion was that responsibility for seaworthiness of the vessel rested on the charterer under a demise charter and liability for unseaworthiness in the civil action therefore could not be asserted against the real owner. However, in *Grillea v. United States*, first reported at 229 F. 2d 687 (2nd. Cir. 1956), on rehearing, 232 F. 2d 919 (1956), the Second Circuit held that an action might be maintained against the vessel *in rem*,

5. The respondents strenuously argue that even if the pallet were found defective, it nevertheless was fit for the purpose for which it was intended. Such an argument completely ignores a specific finding of fact in this case, i.e., that the use of such pallets in this way was the customary, proper and acceptable practice when loading cargo of this nature. To say that the pallets were only "intended" to be used to transfer cargo between the dock and the ship, is to say that what was a customary, proper and acceptable practice was *not* intended.

based upon an unseaworthy condition which arose after the demise.

The problem in this case arises from the fact that the Longshoremens' and Harbor Workers' Act, 33 U. S. C. A. § 901, et seq. (hereinafter referred to as the "Act") specifically states that compensation required to be paid under that Act by the employer "shall be exclusive and in place of all other liability of such employer . . . ", 33 U. S. C. A. § 905. The impleaded respondent Pan-Atlantic, who is liable to the libellant for compensation, argues that since it is owner of the ship *"pro hoc vice"* under the terms of the bare boat charter, an action against the ship *in rem* would in effect be an action against it and is therefore barred by the exclusive remedy provision of the Act, 33 U. S. C. A. § 905. In suport of its position it points to the case of *Smith v. "Mormacdale"*, 198 F. 2d 849 (3rd Cir. 1952), which held that where the employer of a stevedore is also the owner of the ship, the stevedore can not recover against the ship *in rem*, because in such a situation, "an action against the vessel is realistically an action against the employer . . . [and] . . . [t]o impose this additional liability on the employer in a situation where he is also shipowner would radically distort the intent of Congress in enacting the Longshoremens' Act", at page 850.

Undoubtedly, it is the stevedore who will be required to pay if recovery is allowed here. However, this fact alone is not controlling. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). When the reason that such liability will ultimately fall upon the stevedore is traceable to a contract of indemnity with the real owner, he of course can not escape liability by setting this fact up as a defense.

We think that is precisely what the respondent seeks to do here.[6] It does not rely solely upon an indemnity clause

6. The short answer to the respondent's defense lies in dictum of the Supreme Court in the case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). There the Court stated, "[The obligation of seaworthiness] is peculiarly and exclusively the obligation of the [ship's] owner. It is one he cannot delegate. By the same token it is one he cannot contract away . . ." The respondent seeks by means of the bare boat charter to contract for sole responsibility for unseaworthiness and then set up the Act as a bar to recovery.

but rather upon a "bare boat charter", which contains, among other things, an indemnity clause. Nevertheless the *critical* clause in this charter—the clause on which respondent must rely in order to establish the fact that he will stand liable in the present case (which of course was not brought against him but against the S. S. "Yaka") is the indemnity clause.

Respondent makes much of the other features of a bare boat charter. It is true that such a charter results in a complete surrender of operation and control of the ship to the charterer. *Leary v. United States,* 14 Wall. 601 (1871). To emphasize how complete this surrender of ownership is, many cases speak of the charterer under a bare boat charter, as the owner of the ship *"pro hoc vice". Leary v. United States, supra; Randolph v. Waterman, et al.,* 166 F. Supp. 732 (E. D. Pa. 1958). That is a term of art. We do not think that an answer to the present case is to be reached by a detailed exploration of its history and significance. We simply point out that whatever bundle of rights in the ship the real owner surrenders under a bare boat charter, he does retain the right to the return of his ship at some future time.

To the extent that recovery *in rem* against the ship jeopardizes this unsurrendered right, this action is just as much "in reality" against the owner, as it was "in reality" against the stevedore in the *Smith* case, *supra.* The fact that an indemnity clause may exist, can not change this *for the purpose of determining whether the exclusive remedy provisions of the Longshoremens' and Harbor Workers' Act precludes recovery. Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., supra.*

Moreover the question of operation and control of the ship would appear to have no real significance in an *in rem* action for unseaworthiness, since unseaworthiness is not based upon negligence or any wrongful act. Rather it is a form of absolute liability which is imposed regardless of fault. *Seas Shipping Co. v. Sieracki, supra.* Therefore we are not particularly persuaded by the nature of a bare boat

charter. This fact might be more evident if we imagine a case with the exact same facts as the present one, the only difference being that the bare boat charter contained no indemnity clause.[7] In such a suit the charterer would not (as it did here) move to strike the real owner of the vessel as respondent and itself defend the action. Yet the real owner undoubtedly could not set up the Longshoremens' and Harbor Workers' Act as a bar to recovery. The only difference between such a case and our own is the indemnity clause, which the Supreme Court has said is not determinative. See, *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*

The law is settled that where a stevedore is injured as a result of unseaworthiness which arose after the real owner surrendered control to a bare boat charterer (who is not the stevedore's employer), the stevedore can still recover in an *in rem* action against the ship. *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959).

The question of who defends (i.e., the real owner or the charterer under an indemnity clause) is not controlling. We see no reason why the result should be otherwise where the charterer and the stevedore are one and the same person. There are reasons why a court might find otherwise where only *one* person is involved as owner-stevedore combined. The Third Circuit accepted such reasons in the *Smith* case, *supra.* However, the reasons why an *in rem* action against the vessel in such a case is realistically viewed as an action against the stevedore (and thus barred under the Act) are not traceable to any contract of indemnity between parties. In our case they would be. This distinction is fatal to respondent's position. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., supra.* Furthermore we see nothing in this

7. Undoubtedly an indemnity provision is a standard clause in a bare boat charter (or demise charter, as it is sometimes referred to), and would always be required by the real owner. Nevertheless it is not an essential element of such a charter in the sense that without such a clause the charter would not in fact be a bare boat charter. Indeed a bare boat charter without an indemnity provision constitutes a more complete surrender of ownership than one with such a clause, since the *sole* right reserved by the real owner would be the right to the return of physical possession of the ship—with or without incumbrances.

result which will frustrate the clearly manifest intent of Congress to limit the employer's liability to his employee to the remedy provided by the Act. On the contrary, to hold otherwise would be to invite contracted for situations such as we have here, for the sole purpose of destroying a longshoreman's *in rem* remedy which the law of admiralty has traditionally recognized. The Act was not intended to diminish longshoremen's rights, but to enlarge them. *Seas Shipping Co. v. Sieracki, supra.*

It follows from what has been said above that the issue of liability must be determined in favor of the libellant. Waterman Steamship Corporation as claimant of the vessel will therefore be responsible in damages to the libellant in an amount to be determined at a subsequent hearing. It also follows that the liability imposed in this action against the claimant, the owner of the vessel, must, under the bare boat charter, be ultimately paid by the impleaded respondent, Pan-Atlantic Steamship Corporation.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the subject matter and of the parties to this suit.

2. The latent defect in the pallet being used for staging in the No. 2 hold of the S. S. "Yaka" rendered that ship unseaworthy.

3. This unseaworthiness was the sole cause of the injury complained of here.

4. The libellant was not guilty of any contributory negligence.

5. The S. S. "Yaka" is liable *in rem* to libellant.

6. Respondent, Waterman, as owner and claimant of the S. S. "Yaka", is liable to libellant in an amount to be determined at a later hearing.

7. Impleaded respondent, Pan-Atlantic, is liable over to Waterman under the terms of the bare boat charter, for the amount of libellant's recovery.

ORDER AMENDING OPINION.

AND NOW, to wit, this 4th day of May, 1960, it is ORDERED that the opinion sur pleadings and proof filed in the above case on April 29, 1960, be and it hereby is AMENDED by striking lines twenty to twenty-eight inclusive, at page 17, which read:

> "The problem in this case arises from the fact that the Longshoremens' and Harbor Workers' Act, 33 U. S. C. A. § 901, et seq. (hereinafter referred to as the "Act") specifically states that recovery for maintenance and cure under that Act against the employer "shall be exclusive and in place of all other liability of such employer . . .", 33 U. S. C. A. § 905. The respondent Pan-Atlantic, who is liable to the libellant for maintenance and cure, argues"

and by substituting in lieu thereof the following:

> "The problem in this case arises from the fact that the Longshoremens' and Harbor Workers' Act, 33 U. S. C. A. § 901, et seq. (hereinafter referred to as the "Act") specifically states that compensation required to be paid under that Act by the employer "shall be exclusive and in place of all other liability of such employer . . .", 33 U. S. C. A. § 905. The impleaded respondent Pan-Atlantic, who is liable to the libellant for compensation, argues"

By THE COURT:

/s/ THOMAS J. CLARY, J.

ORDER.

In accordance with the opinion of the Court filed April 29, 1960, amended as of May 4, 1960, determining the rights and liabilities of the parties and in accordance with the stipulation of counsel filed herein stipulating as to the amount of the judgment which may be entered;

It is hereby ordered and decreed that judgment is entered in favor of the libellant and against the S. S. "Yaka" in rem and Waterman Steamship Corporation as owner and claimant of the S. S. "Yaka" in an amount of Twelve Thousand Five Hundred Dollars ($12,500.00) plus interest from the date of entry of judgment and costs; and

It is further ordered that Waterman Steamship Corporation, as the owner and claimant of the S. S. "Yaka", shall recover over against Pan-Atlantic Steamship Corporation an amount of Twelve Thousand Five Hundred Dollars ($12,500.00) plus interest from the date of entry of judgment and costs.

/s/ THOMAS J. CLARY, *D. J.*

Dated:
January 19, 1961.

[fol. 75]

APPELLEE'S APPENDIX

Excerpts From Testimony.

Mr. Boardman: It is admitted that libellant is a citizen and resident of the Commonwealth of Pennsylvania and at all times mentioned herein was employed as a longshoreman by the Pan-Atlantic Steamship Corporation. The res is before the Court in that the entry of appearance and the answer to the libel were made as if the vessel, the SS "Yaka", were attached in this jurisdiction.

* * * * * * *

Libellant's Evidence.

Elijah Reed, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Boardman:

* * * * * * *

Q. I believe you said you went to the lower tween-deck in order to prepare for the loading of Hershey chocolate. Would you please describe for the Court what you did in preparing for such loading.

* * * * * * *

A. In preparing we were instructed that we were going to load Hershey chocolate. In this procedure of loading Hershey chocolate we have special specifications what to [fol. 76] do to prepare to load this candy. Now, in preparing this section, what we usually do for a special job is we insulate the floor with Hershey syrup because we are not to put candy on the floor. Then we insulate the floor from the midship across to the wing on the flooring with syrup. Then we have a custom of taking the sheer out of the ship, that is, sizing the ship up, putting it square, preparing for

candy, which we did that with Scott toilet tissue in the sheer of the ship to square it up.

Then after we get the ship square across the wings, across the midship, and the flooring down, we build our staging, which consists of pallets that we can work on, because we get ready for the Hershey candy to come in. In building your staging you have to build a stage to build yourself up high enough, because you have cases of syrup over your floor in your midship and in your wings. Then your staging comes up even to make one even floor where the candy comes in.

* * * * * * *

Q. I take it that the men on the inshore side and the offshore side were doing approximately the same thing?

A. Yes, the same.

* * * * * * *

Q. This insulating floor that you built on the "Yaka" on March 23, about how high was it built from the skin?

A. About two and half or three feet.

* * * * * * *

Q. Was there anything in the hatch square of general cargo or candy?

A. No, no candy or no syrup in the hatch, just the staging.

* * * * * * *

Q. You mentioned that when the draft is getting to that position over the staging some men would holler and the [fol. 77] winch man would then ease the draft down onto the staging.

A. That's correct.

* * * * * * *

Q. Would you need to add to the height of your staging at any time during the process of completing the loading of this chocolate candy?

A. No, because we already had the insulation brought high enough to top it out. That is a permanent working staging there.

* * * * * * *

Q. I ask you to think back, Mr. Reed. What was the condition of the top pallets, the two top pallets of the staging that you used immediately prior to the accident?

* * * * * * *

A. To me they looked all right. They were old dirty pallets, regular wooden pallets. They were old pallets, dirty pallets. They looked good when I worked on it. We wouldn't put no old pallets on top for your staging, so you have to have good pallets on top.

* * * * * * *

Q. Mr. Reed, were these top pallets broken at any time, actually broken through at any time, prior to your accident?

A. No, not that I saw. It could have been defective so I couldn't see it. It looked all right to me. I worked on them.

* * * * * * *

Q. Do you remember how long you worked with the Hershey chocolate in this manner before the accident?

* * * * * * *

A. I would say we worked just candy itself about an hour and a half, hour and three-quarters, just working candy.

* * * * * * *

[fol. 78] Q. How many boards were broken?

A. One.

* * * * * * *

Cross examination.

By Mr. Kildare:

* * * * * * *

Q. You loaded other cargoes of Hershey chocolate; is that so?

A. Yes.

* * * * * * *

Q. I mean at any time at all in your career as a longshoreman how often have you loaded this kind of cargo?

A. Every time the ship is in.

Q. Hershey chocolate?

A. Yes. Pan-Atlantic had the contract. We have the contract. We are the only ones that had the contract, what you call a contract, of loading Hershey candy.

* * * * * * *

Q. Now, Mr. Reed, you say these boards are only about an inch or an inch and a half thick. Haven't you ever seen boards being laid across them to make them a little more substantial for a flooring?

A. We didn't need no boards at this time because we only had two sets of pallets. When you use a staging with boarding, that's when your pallets is set apart, sometimes eight or ten feet apart, and you need a large staging to sit under the hammer. When you use boards your staging has to be out under the hammer in the midship of the ship, then you use your boards to make your flooring and use your pallets to make it level, to get off it or something, but with this operation it is what you call using a small staging. When you use a big staging, that is taking up your whole midship or hatch. Then you use the lumber to make your staging and you don't have enough pallets, but in this operation, the small staging which we have, instead of using one big staging, and using, put it all the way out in the hatch [fol. 79] and use boards to make it level and get back, we didn't have to do that, because working in the forward end, and the staging would come out to the midship in the coaming, so we wouldn't have to use the boards, because it was level with the two drafts of pallets there. It was already a level. It is not like it is wide apart.

Q. How often when you have been loading Hershey chocolate and using pallets for staging have you put a flooring across the top of the pallets in the way of boards or some other cover?

A. On the pallets?

Q. On pallets, on top of pallets.

A. No, we wouldn't use that procedure, because I told you the pallets in the floor would make your own level. That would make your own level. You didn't have to use no boards.

* * * * * * *

By Mr. Byrne:

* * * * * * *

Q. And your testimony as I understand you today is that that board broke before the loaded draft came down; is that right?

A. Yes, sir.

* * * * * * *

Q. And the landing of the loaded draft on your leg didn't break any board in the bottom pallet?

A. No, sir.

* * * * * * *

Redirect examination.

By Mr. Boardman:

Q. Mr. Reed, did you say that you could load the ships faster by building a staging than by not building a staging?

* * * * * * *

A. Sure, you could, yes. You could load a ship faster and working conditions better too, because you would be working on a level and you won't be working down in a [fol. 80] hole. Everything is working on a level. You can work easier on a level than you can working down.

* * * * * * *

Q. As far as your recollection is concerned, there was no steel lid on that ship?

A. No steel lid. Wooden hatches.

* * * * * * *

Lyde Mason, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Boardman:

* * * * * * *

Q. When the draft would be landed on the staging, would it be dropped like a dead weight or would it be eased down?

A. It would be eased out.

Q. How did the winchman know how to actually ease down the draft?

A. When you holler.

Q. Who would holler?

A. Practically most any one of us would holler.

* * * * * * *

Q. What happened to that broken pallet?

* * * * * * *

A. I turned it over where it was broke at and used the other good side.

Q. Did you land chocolate in the same manner after Mr. Reed left the hold as you did before?

A. Same way.

Q. Landing this draft on that pallet?

A. That's right.

Q. How long did you work that day?

A. We worked till 11:00 o'clock that night.

[fol. 81] Q. And did you work that vessel the next day?

A. Yes.

Q. Did you work chocolate in the same hold?

A. Yes, sir.

Q. On the same side?

A. Same ship, same side, same hold.

Q. Did anybody ever tell you, after Mr. Reed got hurt, to make any changes or to do it any differently?

A. No, sir, that's the only way we load chocolate.

* * * * * * *

Cross examination.

By Mr. Kildare:

* * * * * * *

Q. You have loaded Hershey or other types of chocolate before this time, have you?

A. Yes, sir, we have loaded some, sure.

* * * * * * *

Q. Was it generally the practice to use pallets for stagings when you loaded chocolate?

A. Yes, we use it for chocolate; we use it for other different cargo, too.

* * * * * * *

Q. What do you mean, you are not allowed to use them?
A. I didn't say we are not allowed to use them. I say we don't use them because there would be no necessity, because that would make your staging higher.

* * * * * * *

Q. Are you saying you never used dunnage?
A. Not on no stage. I mean like that.

* * * * * * *

. . . I say that Section 33 of the act does not give him the right to maintain this action, because in truth and in fact it is an action against his employer, and that is the legal defense upon which I ground a motion to dismiss.

* * * * * * *

[fol. 82]

EXCERPT FROM DEPOSITION OF JOHN C. TATTERSALL.

Deposition of John C. Tattersall, taken for purposes of discovery, pursuant to notice, at the offices of Rawle & Henderson, 1910 Packard Building, Philadelphia, Pennsylvania, on Monday, June 15, 1959, commencing at 11:00 o'clock A. M.

* * * * * * *

Cross examination.

By Mr. Boardman:

* * * * * * *

Q. Where is the Philadelphia Office of Pan-Atlantic Steamship Corporation?
A. 12 South Twelfth.
Q. And of Waterman Steamship Corporation?
A. Waterman has no office here.

Mr. Kildare: You're speaking at the present time?
The Witness: At the present time.

By Mr. Boardman:

Q. In March, 1956?

A. Waterman was the office and acted as Agent for Pan-Atlantic.

Q. Waterman had an office in Philadelphia in March, 1956?

A. Waterman had an office in Philadelphia in March, 1956.

Q. And where was that?

A. 12 South Twelfth.

• • • • • • •

[fol. 83]

EXCERPTS FROM REQUESTS OF PAN-ATLANTIC STEAMSHIP CORPORATION FOR FINDINGS OF FACT.

1. The Court has jurisdiction of the parties and the subject matter of this proceeding.

• • • • • • •

Respectfully submitted,

Krusen, Evans and Shaw, By T. E. Byrne, Jr., Proctors for Impleaded Respondent. Pan-Atlantic Steamship Corporation.

[fol. 84]

EXCERPTS FROM RESPONDENT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Respondent Steamship YAKA, and Waterman Steamship Corporation as claimant, by their proctors, request the Trial Judge to make the following findings of fact and conclusions of law:

I. Findings of Fact.

1. The court has jurisdiction of the parties and the subject matter of this proceeding.

• • • • • • •

Respectfully submitted,

Rawle & Henderson, By Harrison G. Kildare, Proctors for Respondent.

[fol. 85]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Appeal No. 13600

Appeal Nos. 13600 and 13601

ELIJAH REED,

vs.

Steamship YAKA, Her Engines, Boilers, Machinery, etc. (Waterman Steamship Corporation, owner and claimant), Appellant,

vs.

PAN-ATLANTIC STEAMSHIP CORPORATION.

PETITION FOR CONSOLIDATION OF APPEALS AND CONSENT THERETO—Filed May 5, 1961

To the Honorable, the Judges of the Said Court:

By reason of the fact that this appeal is taken by Steamship YAKA from the same Final Decree which is involved in the pending appeal by Pan-Atlantic Steamship Corporation, Appeal No. 13601, Steamship YAKA by its counsel petitions this Honorable Court to order consolidation of the two appeals for purposes of briefing and argument.

Rawle & Henderson, By [Signature Illegible], Attorneys for Appellant.

We consent to the foregoing Petition for Consolidation:

Freedman, Landy & Lorry, By Joseph Boardman, Attorneys for Elijah Reed.

Krusen, Evans & Shaw, By T. E. Byrne, Jr., Attorneys for Pan-Atlantic Steamship Corporation.

[File endorsement omitted]

[fol. 86]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

ELIJAH REED, Appellee,

v.

Steamship YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant), Appellant in No. 13,600,

and

PAN-ATLANTIC STEAMSHIP CORPORATION, Appellant in No. 13,601.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued December 18, 1961

Before: McLaughlin, Kalodner and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed April 27, 1962

By HASTIE, Circuit Judge.

Libellant Reed, the appellee here, is a longshoreman who was injured while employed by appellant Pan-Atlantic [fol. 87] Steamship Corporation and engaged in loading the steamship Yaka. The accident occurred in the hold of the ship when a wooden pallet upon which Reed was standing broke. The pallet was part of staging which the longshoremen themselves had brought on board the ship and had erected.

The libel was solely in rem against the Yaka. The ship was and is owned by Waterman Steamship Corporation,

which, as owner and claimant, has defended this libel. However, at the time of the accident in suit the ship had been demised to and was being operated by Pan-Atlantic Steamship Corporation as a bareboat charterer. This libel was instituted after the expiration of the demise and the return of the ship to its owner.

The libel was filed in the Eastern District of Pennsylvania at a time when the Yaka was not within that jurisdiction. However, Waterman answered the libel on its merits averring that it "voluntarily appeared as claimant to avoid attachment and delay of the vessel if it should subsequently be present" within the jurisdiction. Waterman also impleaded Pan-Atlantic as the demisee of the ship at the time of the accident, alleging that Pan-Atlantic was obligated to indemnify the ship and its owner for any loss they might suffer as a result of the principal claim.

A trial on the question of liability resulted in a permissible finding that libellant's injury had been caused by an unseaworthy condition created by Pan-Atlantic's employees during the demise. 1960, 183 F. Supp. 69. The court then concluded as a matter of law that, although the Longshoremen's and Harbor Workers' Act prevented Pan-Atlantic from being liable to its employee Reed for breach of warranty of seaworthiness, the ship was nevertheless accountable in rem for the injuries caused by its unseaworthiness. At the same time, liability over was imposed upon Pan-Atlantic. Both Waterman, on behalf of the Yaka, and Pan-Atlantic have appealed.

On this appeal, it is argued for the first time that jurisdiction in rem never attached in this case because the [fol. 88] ship was never arrested and no bond or stipulation for value was ever filed.[1] The second and more fundamental

[1] This contention is advanced by Pan-Atlantic, which had no interest in the Yaka when this proceeding was instituted against the ship. Waterman, the owner then in possession, has not challenged the venue. In these circumstances, while we shall consider the issue on its merits, the standing of Pan-Atlantic to raise it is at least doubtful. Compare *Ryan Stevedoring Corp.* v. *Pan-Atlantic S. S. Corp.*, 1956, 350 U. S. 124, where it was made clear that the third-party defendant's rights and duties must be viewed independently of the legal relationship between the longshoreman and the shipowner.

contention of both appellants is that the accident did not and could not subject the ship to any liability in rem because it did not create any personal liability against anyone having an interest in the ship.

The first point requires only brief analysis. While the power of an admiralty court to exercise authority over a ship normally depends upon the arrest of the ship within the court's territorial jurisdiction, a claimant can waive this requirement and consent to jurisdiction so far as its interest in the vessel is concerned. *The Willamette*, 9th Cir. 1895, 70 Fed. 874. See generally 2 Benedict, Admiralty, Knauth ed. 1940, § 242. A recent decision of the Supreme Court, *Continental Grain Co.* v. *Barge FBL-585*, 1960, 364 U. S. 19, is instructive. In that case a ship was beyond the jurisdiction of the court when a proceeding in rem was filed against it. However, the owner, as claimant, gave the libellant a "letter undertaking" stipulating that the rights of the parties would "'for all purposes be . . . precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* processes, and released by the filing of claim and release bond . . . .'" Id. at 29. The Supreme Court treated this submission as perfecting the jurisdiction of the court. We think the voluntary appearance of the claimant to respond to the libel on its merits in this case was an equivalent and equally effective undertaking that its interest in the ship should be subject to the authority of the court. *Cf. United States* v. *Ames*, 1879, 99 U. S. 35; *J. K. Welding Co.* v. *Gotham Marine Corp.*, S.D.N.Y. 1931, 47 F.2d 332.

[fol. 89] We come now to the basic contention that the imposition of liability on the ship was improper because the accident in suit gave rise to no personal liability.

A similar question was carefully considered and decided by this court in *Smith* v. *The Mormacdale*, 1952, 198 F.2d 849, *cert. denied*, 1953, 345 U. S. 908. There the owner and operator of a ship employed a stevedore who was injured as a result of the unseaworthiness of the vessel. Since the Longshoremen's and Harbor Workers' Act, in establishing a workmen's compensation scheme, deprived an injured employee of all other rights against his employer, the injured longshoreman took no action against the

shipowner but libeled the ship, claiming that it was directly and independently liable in rem for the consequences of its unseaworthiness. However, this court described such a proceeding against the ship itself as merely a procedural device of admiralty for more readily effectuating the liability of some jural person who has breached some personal obligation, in that case the absolute duty that the law imposes upon a shipowner to maintain a seaworthy vessel. We looked through the fiction of "the so-called independent personality of the ship" and recognized that "an action against the vessel is realistically an action against" the owner, 198 F.2d at 850. Analytically, there had to be a pre-existing maritime lien upon which to base the remedy of recovery from or through the ship, and since the owner-employer was not liable to its injured employee, there was no underlying obligation that could have given rise to such a lien. Accord, *Samuels* v. *Munson S. S. Line*, 5th Cir. 1933, 63 F.2d 861; *cf. Continental Grain Co.* v. *Barge FBL-585, supra.* See generally GILMORE & BLACK, ADMIRALTY, 1957, 483-510.

The case at hand is different only in that the suing longshoreman's employer was a bareboat charterer rather than an owner. But for present purposes that is not a significant distinction. In admiralty such a demisee acquires full control and authority over the ship and the rights and duties which attend such dominion. He takes the owner's place [fol. 90] for the term of the demise. *United States* v. *Shea*, 1894, 152 U. S. 178; *Leary* v. *United States*, 1871, 81 U. S. (14 Wall.) 607, 610 (dictum); GILMORE & BLACK, *op. cit. supra* at 215-216. Thus, the doctrine of *Smith* v. *The Mormacdale* is applicable to this case and prevents the present libellant from recovering against the Yaka unless someone other than his employer breached a duty to provide longshoremen with a seaworthy ship.

The only other person who was even arguably so obligated is Waterman. Unquestionably, as owner, Waterman warranted the seaworthiness of the vessel as transferred to the bareboat charterer. *Work* v. *Leathers*, 1878, 97 U. S. 379. Indeed, the charter so provided. But the unseaworthiness here resulted solely from the subsequent conduct of the demisee's employees in bringing a defective appliance on to the ship. The Court of Appeals for the Second Circuit has

recently considered this very problem and has ruled, correctly we think, that an owner is not liable for unseaworthiness, originating and causing injury while a demisee is operating a ship. To that court it seemed neither fair to the demisor nor necessary to protect those who should deal with the ship during the term of the charter that this type of liability without fault should "extend beyond the demisee, on whose initiative and for whose profit the venture had been undertaken . . . [to] include the demisor, who has done no more than put the demisee into possession of the ship . . . ." *Grillea* v. *United States*, 2d Cir. 1956, 229 F.2d 687, 690. We think this position is sound and, therefore, that libellant cannot base his action on any warranty by Waterman that its demisee would not bring aboard unseaworthy appliances.

Thus, analyzed, this suit is an attempt to use the procedural device of a libel in rem against a ship for injury caused by its unsafe condition in the absence of any underlying obligation of anyone to respond in damages for breach of warranty of seaworthiness. In essence libellant is asserting that a maritime lien has arisen in his favor though he [fol. 91] cannot show any lien-creating obligation. In these circumstances, we think the libellant was not entitled to recover.

We recognize that a contrary result has been reached by the Court of Appeals for the Second Circuit. *Grillea* v. *United States*, 232 F.2d 919. It seems to us, however, that this result was achieved by incorrectly treating the fictional personification of the ship as something more than the procedural device that it is. The same problem subsequently came before the Court of Appeals for the First Circuit in *Pichirilo* v. *Guzman*, 290 F.2d 812, cert. granted, 1961, 368 U. S. 895. Disagreeing with *Grillea*, that court reasoned as we do that the absence of any lien-creating personal obligation of the demisor or the demisee precluded any recovery against the ship in rem.

The judgment will be reversed.

[fol. 92]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,600; 13,601

ELIJAH REED,

vs.

Steamship YAKA, her engines, boilers, machinery, etc. (Waterman Steamship Corporation, Owner and Claimant), Appellant in No. 13,600,

vs.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellant in No. 13,601.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: McLaughlin, Kalodner and Hastie, Circuit Judges.

JUDGMENT—April 27, 1962

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

April 27, 1962

[File endorsement omitted]

[fol. 93]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13600 and 13601

[Title omitted]

STIPULATION RE FILING OF PETITION FOR REHEARING AND APPROVAL THERETO—May 10, 1962

Subject to the approval of this Honorable Court, it is hereby stipulated by and between counsel for the parties that the time within which petition for Rehearing may be filed in this Court shall be extended to and including June 11, 1962.

The reason that this extension is requested is that Counsel for Appellee was and is heavily engaged in the preparation of cases for both the Federal Court and the Common Pleas Court and Pichirilo v. Guzman, a case which closely resembles the factual and legal situation in the instant case was argued before the Supreme Court of the United States on March 29, 1962 and the decision may be handed down shortly.

Krusen, Evans and Byrne, Attorneys for Appellant in No. 13601.

Rawle and Henderson, Attorneys for Appellant in No. 13600.

Freedman, Landy and Lorry, Attorneys for Appellee.

Approved

William H. Hastie, Circuit Judge.

May 10, 1962

[File endorsement omitted]

[fol. 94]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

[Title omitted]

Appeals from the Final Decree of the United States District Court for the Eastern District of Pennsylvania, No. 123 of 1958, In Admiralty.

PETITION OF ELIJAH REED FOR REHEARING—
Filed June 11, 1962

[File endorsement omitted]

[fol. 95]

PETITION OF ELIJAH REED FOR REHEARING

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The Petition of Elijah Reed, appellee, prays for a rehearing and reconsideration of the decision rendered by your Honorable Court on April 27, 1962.

This is an action in rem brought against the S. S. "Yaka" by a longshoreman, for damages for injuries sustained by reason of the unseaworthy condition of the vessel. Libellant was employed by Pan-Atlantic Steamship Corp., and engaged in loading the said vessel, which was owned by Waterman Steamship Corp., but, at the time, under bareboat charter to Pan-Atlantic.

Waterman claimed the vessel, answered the libel, and impleaded Pan-Atlantic. The trial took place on January 4, 1960, before the Honorable Thomas J. Clary, who found that libellant's injuries had been caused by an unseaworthy condition of the vessel, that the vessel was liable in rem and that Pan-Atlantic was liable over, under the terms of an indemnity agreement (183 F. Supp. 69).

On appeal, this Court reversed, in an opinion filed April 27, 1962, holding that liability in rem could not arise in absence of an underlying in personam liability of someone

having an interest in the vessel, relying upon the doctrine of *Smith* v. *S. S. "Mormacdale"* (3 Cir., 1952), 198 F. 2d 849.

The present petition is based upon the following reasons;

[fol. 96] (1) An underlying personal obligation is not necessary to the existence of in rem liability of a vessel for unseaworthiness; for the vessel is, under the American maritime law, a substantial person, subject to specific and individual liabilities; and the Longshoreman's Compensation Act did not deprive longshoremen of their rights in rem against the vessel.

(2) The decision in *Smith* v. *Mormacdale* is inapplicable here, where the shipowner is not the employer, and thus, not protected by the Longshoremen's Compensation Act.

I. An Underlying in Personam Obligation is Not Necessary to the Existence of in Rem Liability; the Longshoremen's Compensation Act Did Not Affect Existing Rights in Rem Against the Vessel.

The conclusion of this Court that no lien ever arose, and an in rem obligation never came into existence because of the protection afforded by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 905, is in conflict with the reasoning and conclusion of the Supreme Court in *Plamals* v. *The Pinar Del Rio*, 277 U.S. 151, 72 L. Ed. 827 (1928); and the specific principles announced in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 90 L. Ed. 1099 (1946) and the subsequent decisions involving the rights of the longshore workers.

It was in The Pinar Del Rio case that the Supreme Court laid down the rule that a maritime lien must precede any in rem liability of a vessel. There, the plaintiff, a seaman, sued the vessel in rem, under the Jones Act, 46 U.S.C.A. [fol. 97] 688, et seq. The Supreme Court held that since the statute did not expressly create a lien, none could be inferred, and, therefore, no action in rem could exist under that statute. But, the Court ruled that the seaman did have two choices; an action in personam against the employer, under the Jones Act, or his existing action in rem against the vessel, under the general maritime law, which provides the necessary lien, and which remains wholly unaffected by

the Jones Act. It was clear that the new statute, not expressing a change in existing rights, had no effect upon them.

The Longshoremen's Act similarly created an in personam liability for compensation against the employer, without creating any right of lien against the vessel. There is no doubt that it left unchanged any already established lien rights. It gave the longshoreman new rights against his employer in personam and gave the latter a defense against damage actions in personam. Thus, the rights of the longshoreman, except as specifically limited by the statute, remain unaffected either "by construction, analogy or inference" (cf. The Pinar Del Rio, U.S. at 156 L. Ed. at 829). Therefore, similarly, the longshoremen, as seamen may invoke their remedy against the ship, under the general maritime law, or they may make claim against their employers under the Compensation Act.

This remains clear just as the Jones Act, which applies to employers, had no effect upon the seaman's right in rem against the vessel, neither does the Longshoremen's Act have any effect upon the longshoreman's right in that re-[fol. 98] gard. It afforded a defense to the employer, as to his specific personal liability, but went no further. The Pinar Del Rio emphasized clearly that the vessel is a separate and distinct legal entity, so distinct that while the seaman could not proceed under the Jones Act against the vessel in rem, it could nevertheless proceed personally against its owner, his employer.

Subsequently, in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 90 L. Ed. 1099 (1946), the Supreme Court reconfirmed the continuation of these rights of the longshoreman. The Court said (U. S. at 102, L. Ed. at 1110):

> "We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer. . . . But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against third persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance,

presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone."

It must be noted that the Supreme Court specifically limited the effect of the statute to the *employer* alone, and exclusively so. In recognizing the continued existence of all prior rights other than against the employer, the Supreme Court cited with approval The Pacific Pine (W. D., Wash., 1929), 31 F. 2d 152, 155, which held that the ship is a "third person" against whom the longshoreman may still bring his libel in rem.

[fol. 99] We submit that the position that an in rem proceeding is "merely a procedural device" or that it is a mere "fiction" and that such proceeding is "realistically an action against the owner" (Opinion of this Court, p. 4), denies the existence of a concept of substantive American maritime law that is as essential and recognized as the very existence of admiralty jurisdiction. Historically and without reservation, American jurists, lawyers and writers have held and stated that a ship is a distinct juridical entity, specifically answerable for its unseaworthiness.[1]

The uniqueness of the personification doctrine, applied only to vessels, renders it, at times, difficult to apply to its required result. For, it is, indeed, unique. But, it is this peculiar quality which alerts us to the expectation of the unique result which it requires. Justice Holmes, recognizing that this difference might at times delay or deprive a full maritime remedy, has admonished:

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[1] *The Palmyra*, 25 U.S. (12 Wheat.) 1, 6 L. Ed. 531 (1827); *U.S.* v. *Malek Adhel*, 43 U.S. (2 How.) 210, 11 L. Ed. 239 (1844); *The China*, 74 U.S. (7 Wall.) 53, 19 L. Ed. 67 (1869); *The John G. Stevens*, 170 U.S. 113, 42 L. Ed. 969 (1898); *The Barnstable*, 181 U.S. 464 (1901); *The Osceola*, 189 U.S. 158, 175, 47 L. Ed. 760 (1903); *Canadian Aviator, Ltd.* v. *U.S.*, 324 U.S. 215, 89 L. Ed. 901 (1945); *Cannella* v. *Lykes Bros. Steamship Co.*, 174 F. 2d 794 (2d Cir., 1949); *Carbon Black Export, Inc.* v. *S. S. Monrosa*, 254 F. 2d 297 (5th Cir., 1958); *Crumady* v. *J. H. Fisser*, 358 U.S. 423, 3 L. Ed. 2d 413; 1 *Benedict on Admiralty*, 17 et seq.; *Gilmore and Black, The Law of Admiralty*, Chap. IX (3), p. 494; 1 Norris, *Law of Seamen* (1951), p. 462; *Robinson on Admiralty* (1939), pp. 364, 612.

[fol. 100] "*A ship is the most living of inanimate things.* . . . And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. *It is only by supposing the ship to have been treated as if endowed with personality*, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, *and on that supposition they at once become consistent and logical.*" (The Common Law, 1938, pp. 26-27) (Emphasis supplied).

The position expressed by this Court that an action in rem against a vessel is merely a procedural device is the concept that has been adopted by the British courts. The American courts, however, have regularly retained the personification theory. Indeed, this split in concept has been declared to be the outstanding difference between the two systems. A British writer on maritime liens has pointed out that, because of this difference, in England the personal liability of the shipowner is necessary to support an action in rem, whereas it is not required in the American maritime law, since the ship is here regarded as an entity.[2]

If the libel in rem were merely a procedural device, the owner would be sued in his own name, the lien could attach only upon the personal obligation of the owner, there would be no limit of liability to the value of the vessel, and the lien would be destroyed by a change of ownership. But, the exact opposite propositions occur under American maritime law: the vessel is sued in its own name,[3] the lien attaches, [fol. 101] irrespective of the obligation of the owner,[4] the limit of liability is the value of the vessel,[5] and the lien remains despite change of ownership.[6]

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[2] Price, "*The Law of Maritime Liens*" (p. 118 (1940)).

[3] *Admiralty Rules* 10, 14; 1 *Benedict on Admiralty*, Section 11, 12.

[4] *The Barnstable, supra;* Holmes, *The Common Law*, p. 29.

[5] *The John G. Stevens, supra.*

[6] *The John G. Stevens, supra; Gilmore and Black, supra*, p. 482; 1 *Benedict, supra*, p. 25; *The Bold Buccleugh*, 7 Moore P.C. 267 (1861).

Further recognition of the independence of the ship from its owner lies in its responsibility for its own unseaworthiness. *It* is the offender, regardless of the existence or not of a co-offender. Thus, a good-faith purchaser of the vessel, although entirely innocent and subject to no in personam liability, may have his ship arrested and sold;[7] the negligent operation by a compulsory pilot gives rise to a libel in rem in favor of the injured party against the offending vessel;[8] and, a vessel under bareboat charter is liable in rem to an injured party despite the lack of control on the part of the owner.[9] All aspects of control, authority, responsibility, knowledge, and ownership are immaterial. Two remedies are available—an action in personam and an action in rem.[10] Never was one necessary before the other arose. The duty to provide a seaworthy vessel does not arise out of the personal relation between the longshoreman and the owner or operator. It arises out of the maritime status inherent in the relationship between the long-[fol. 102] shore worker, the vessel, and the attendant hazards of maritime work. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 90 L. Ed. 1099. There may or may not be someone liable in personam, depending on the defenses available. But the vessel, as an individual is liable for unseaworthiness, resulting in personal injury. And, upon the occurrence of injury, the lien arises, which is "an enforceable interest in the ship," and gives rise, in turn, to a proceeding in rem against the offending ship. 1 *Benedict on Admiralty*, pp. 17-18.

In addition to the Smith case, this Court relies on the decision of the First Circuit in *Pichirilo* v. *Guzman*, 290 F. 2d 812 (1961), which also held that absence of a personal

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[7] *The Bold Buccleugh, supra; The John G. Stevens, supra; Gilmore and Black, supra*, p. 482; 1 *Benedict, supra*, p. 25.

[8] *The China, supra; Logue Stevedoring Corp.* v. *The Dalzellance, etc.*, 198 F. 2d 369 (2d Cir., 1952).

[9] *The Barnstable, supra; U. S.* v. *The Helen*, 164 F. 2d 111 (2d Cir., 1947); *Davis* v. *M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md., 1951).

[10] *Cannella* v. *Lykes Bros S. S. Co., supra.*

obligation precluded recovery in rem (Opinion, p. 6). The District Court had found that a demise of the vessel to plaintiff's employer had not taken place, so that the workmen's compensation defense did not arise. The Court of Appeals reversed, holding that there was a demise, so that the defense applied, and the libel in rem would not stand, there being no personal liability. On appeal, the Supreme Court reversed, upon the ground that the District Court's findings of fact were not clearly erroneous. *Guzman* v. *Pichirilo*, —— U. S. ——, 30 L. W. 4378 (5/21/62). The Court stated specifically that it was not passing on "whether the vessel can be held liable in rem when neither the demisee nor the owner is personally liable." This was despite the urging by Mr. Justice Harlan, dissenting, that the merits of the availability of an action in rem should have been decided and that he would have affirmed the Court of Appeals. We submit that the Supreme Court has thus spe- [fol. 103] cifically left open the issue, and implies a desire that the Pichirilo-Smith doctrine be re-examined.

In assessing the background of the First Circuit decision in Pichirilo, it is noted that Judge Aldrich cited *Noel* v. *Isbrandtsen Co.* (4 Cir., 1961), 287 F. 2d 783 in support of the proposition that absence of personal obligation negates in rem liability (290 F. 2d at 814-15). This application of *Noel* sheds a possible light upon the reasoning which led to the adoption of the principle there expressed. For, *Noel*, clearly, does *not* stand for the proposition for which it was cited, but states only that a ship cannot be liable in rem unless a breach or violation has been committed. It is emphatic in distinguishing this from the presence of a breach but absence of any personal liability therefor (287 F. 2d at 786). The absence of liability in personam which is herein considered is *not* the result of the absence of the breach of a duty. The concept involved asumes the existence of a breach, whether there exists personal liability or not. It is the existence of a *personal defense* or insulation from claim, by special statute, that negates the in personam liability. In *Noel*, the Court specifically recognized that the "doctrine of in rem liability has been extended to a ship under bare-boat charter" where a breach of duty existed, and cited with approval Judge Hand's language in

Grillea (232 F. 2d at 924) (786). Indeed, where there had been no violation or breach on the part of anyone, it is conceded that there could be no liability, either in rem or in personam. But that is not the situation that has been presented to the courts in the presently discussed cases. [fol. 104] A case which is exactly on point with the present one, and which discusses all of the issues at bar is *Grillea* v. *U.S.*, 232 F. 2d 919 (2d Cir., 1956). The Court held that a vessel is liable in rem for its unseaworthiness, irrespective of in personam liability on the part of anyone. Judge Hand could see "no reason why a person's property should never be liable unless he or someone else is liable 'in personam'" (924).

This Court expresses disagreement with Grillea: that it is but an incorrect treatment of personification "as something more that the procedural device that it is" (Opinion, p. 6). We submit that Judge Hand's opinion was based upon the personification principle as a matter of substance in the same manner as did the Supreme Court in Sieracki, wherein it recognized the ship as "a third person."[11] It gave the vessel an individually and substantial personality as the Supreme Court did in *Crumady* v. *"Joachim Hendrik Fisser,"* 358 U.S. 423, 428, 3 L. Ed. 2d 413, 417, wherein, in applying the converse principle, the warranty owed by a stevedore was held to be for the benefit of the *vessel*, whether or not the vessel's owners were parties to the contract. Thus, the personification doctrine applies in all aspects, for the liability and the benefit of the ship.

[fol. 105]

II. The Decision in Smith v. Mormacdale Is Inapplicable to This Case.

This Court has relied upon its prior decision in *Smith* v. *"The Mormacdale,"* 198 F. 2d 849 (3d Cir., 1952). We respectfully submit that the opinion there is inapplicable here. There, the shipowner was also the longshoreman's employer. This Court said, in Smith, that *"where the vessel is the property of the employer"* an action against the vessel

[11] 328 U.S. at 102, 90 L. Ed. at 1110, note 21, citing The Pacific Pine.

is really against the employer (850), who is protected from liability by the Longshoremen's Act. This Court made it clear that only where the *shipowner* was also the employer did that statute lend its offices.

Now, this Court has applied Smith to a situation where the employer is not the shipowner, but a bareboat charterer, stating that the distinction is not significant. This Court relies upon the fact that such demisee acquires full control of the vessel (Opinion, pp. 4-5). But, he does *not* acquire *ownership* of the vessel, any more than does the lessee of a building. The owner retains his title, and a pecuniary interest in the vessel and its operation.[12] And, he continues to have the obligation that the vessel be seaworthy. This obligation remains non-delegable and continuing, and the shipowner is not relieved thereof by giving up control of the ship. *Seas Shipping Co.* v. *Sieracki, supra.* The mechanism [fol. 106] of a lease of the vessel does not destroy the interest of the owner nor his concomitant non-delegable obligations. The owner's interest remains, and so does the longshoreman's right of lien against the vessel of which the owner holds title.

The distinction in the case of a charterer-employer is indeed significant and substantial. He may take the owner's control, but not his ownership and related obligations. "Ownership" pro hac vice does not involve passage of title nor does it encompass a dissolution of right to return of the vessel free of lien. Nor does the demise make the longshoreman the employee of the owner.

The mechanism of bareboat charter in cases like the present is a deprivation of the longshoreman's right to a seaworthy vessel. The decision of this Court permits the owner to insulate himself by a charter, and the charterer to protect himself by pleading immunity under the Longshoremen's Act. The taking away from longshoremen of the protective warranty of seaworthiness conflicts with the prin-

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[12] The demisor relinquishes "possession, command and navigation," but he does *not* transfer his ownership. *Guzman* v. *Pichirilo*, —— U. S. ——, 30 L. W. 4378 (5/21/62).

ciples enunciated by the Supreme Court in Sieracki. The decision herein permits the shipowner to deny his continuing and non-delegable duty by a simple device that has been common and, indeed, quite prevalent.[13] It becomes unnecessary for a vessel to be seaworthy; the longshoreman's [fol. 107] right becomes restricted to compensation, and Sieracki becomes meaningless.

The present decision is such a sharp departure from historically recognized principles of the maritime law, and so contrary to the characteristic features and humanitarian policies thereof, that it should not be allowed to stand without further examination.

It is respectfully urged that this Court grant rehearing and reargument upon the questions presented.

Respectfully submitted,

Abraham E. Freedman, Joseph Boardman, Freedman, Landy and Lorry, Attorneys for Appellee-Petitioner.

I, Joseph Boardman, hereby certify that I am of counsel for Elijah Reed, the appellee and petitioner in this proceeding, and that the foregoing Petition is presented in good faith and not for delay.

JOSEPH BOARDMAN

[13] Here, Pan-Atlantic was formerly wholly owned by Waterman, and, at the time of the injury, both companies were owned by McLean Industries. Thus, any device inter se is available, according to the legal climate at the time.

[fol. 108]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

ELIJAH REED, Appellee,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, etc. (Waterman Steamship Corporation, Owner and Claimant), Appellant in No. 13,600,

and

PAN-ATLANTIC STEAMSHIP CORPORATION, Appellant in No. 13,601.

On Petition for Rehearing

Present: Biggs, Chief Judge; and McLaughlin, Kalodner, Staley, Hastie, Ganey and Smith, Circuit Judges.

OPINION OF THE COURT—Filed July 16, 1962

PER CURIAM:

The petition for rehearing presents nothing of significance that was not fully considered in deciding this appeal.

The petition is denied.

BIGGS, CHIEF JUDGE, dissenting.

The majority view that no *in rem* obligation came into existence because there was no subsisting *in personam* obligation is untenable. The majority view seems to be contrary to the reasoning of the Supreme Court in Plamals [fol. 109] v. The Pinar Del Rio, 277 U.S. 151 (1926), and Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). A bareboat charter cannot insulate the ship owner from liability.

The Supreme Court again and again has held that the ship owner has a non-delegable absolute duty to maintain the vessel in a seaworthy condition. A charterer under circumstances such as those at bar does not gain immunity because of the Longshoremen's and Harbor Workers' Compensation Act. I think the case is wrongly decided for it takes away from the longshoreman the very important protective warranty of seaworthiness and limits Sieracki greatly.

But quite aside from the foregoing, the Supreme Court in Guzman v. Pichirilo, 369 U.S. 698 (1962), expressly left open the issue of whether "a charter party relieves the owner of his traditional duty to maintain a seaworthy vessel." Moreover, the Supreme Court in note 2 cited to the text in Pichirilo specifically referred to our decision in the instant case and stated that we "had aligned ourselves in toto with the position of the Court of Appeals for the First Circuit." See 290 F.2d 812 (1961). I think that the importance of the case at bar justifies rehearing by the court en banc. I therefore must respectfully dissent from the order refusing to grant rehearing.

STALEY, CIRCUIT JUDGE, dissenting.

I join Chief Judge Biggs in his conclusion in his dissent. I read his dissent as not disturbing Smith v. The Mormacdale, 198 F.2d 849 (C.A.3, 1952), where the employer was also the shipowner.

[fol. 110]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

[Title omitted]

ORDER STAYING MANDATE—July 26, 1962

Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until August 20, 1962.

William H. Hastie, Circuit Judge.

July 26, 1962.

[fol. 111] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 112]

SUPREME COURT OF THE UNITED STATES

No. 509—October Term, 1962

ELIJAH REED, Petitioner,

v.

STEAMSHIP YAKA, etc., *et al.*

ORDER ALLOWING CERTIORARI—December 17, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant),

and

PAN-ATLANTIC STEAMSHIP CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

October Term, 1962.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

AND

PAN-ATLANTIC STEAMSHIP CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Elijah Reed, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter on July 16, 1962.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 183 F. Supp. 69 (E. D. Pa., 1960) (Appellants' Appendix 58a). The opinion of the Court of Appeals for the Third Circuit is reported at 302 F. 2d 255 (*infra*, p. 17). The opinion of the Court of Appeals for the Third Circuit on the Petition for Rehearing is reported at — F. 2d — (*infra*, p. 24).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1962 (*infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Is a vessel in the possession and control of a demise charterer liable in rem for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control of the vessel, and if the demise charterer is also the stevedore-employer?

STATEMENT OF THE CASE.

The Trial Court found petitioner, a longshoreman engaged in the loading of the S. S. "Yaka", was injured due to the unseaworthiness of the vessel. The "Yaka" was owned by Waterman Steamship Corporation and at the time of the accident was demised by bareboat charter to Pan-Atlantic Steamship Corporation.

A Libel In Rem was filed against the S. S. "Yaka." The trial took place on January 4, 1960, before the Honorable Thomas J. Clary, who found the vessel to be unseaworthy. Accordingly, he ruled that the vessel was liable in rem to the petitioner and that Pan-Atlantic was liable

over to Waterman Steamship Corporation under the express terms of an indemnity agreement (183 F. Supp. 69).

On appeal, the Court of Appeals for the Third Circuit reversed the District Court. While affirming the finding of unseaworthiness, the Court below held that liability in rem could not arise in the absence of an underlying in personam liability of someone having an interest in the vessel. The Court reasoned that since neither the owner nor the employer was liable in personam to the injured employee, there was no underlying obligation which would give rise to an in rem recovery against the vessel. The Court refused to treat the vessel as a distinct juridical entity and in so doing specifically disagreed with the ruling of the Second Circuit in *Grillea v. United States*, 232 F. 2d 919 (2 C. A. 1956).

A petition for rehearing was denied, with Chief Judge Biggs and Judge Staley dissenting from the denial. Judge Biggs stated that the majority view was contrary to the reasoning of this Court in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928) and *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946), and opined further that the majority view which precluded an in rem obligation where there was no subsisting in personam obligation was untenable. Judge Staley dissented because of the majority's reliance on *Smith v. Mormacdale*, 198 F. 2d 849 (3 C. A. 1952). He felt that the *Smith* opinion, of which he was the author, was inapplicable to a case where the shipowner was not the employer.

This petition seeks a review of the decision of the Court of Appeals for the Third Circuit which reversed the judgment of the District Court.

ARGUMENT.

The Decision of the Court Below Is in Violation of the Concepts Set by This Court in Plamals v. Pinar Del Rio, 277 U. S. 151 (1928); Seas Shipping Company v. Sieracki, 328 U. S. 85 (1946) and It Is in Direct Conflict With the Decision of the Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919 and Leotta v. S. S. "Esparta", 188 F. Supp. 168 (S. D. N. Y. 1960), Which Held That an Underlying in Personam Obligation Is Not Necessary to the Existence of In Rem Liability So That the Longshoremen's Compensation Act Cannot Affect Existing Rights In Rem Against the Vessel.

American maritime law has traditionally recognized the vessel as a personality independent and exclusive of its owners and operators. It is so completely a separate and distinct juridical entity that it may be sued, held liable, and financially answerable for its trespasses. This responsibility of a vessel for its own torts is exclusive and independent of other possible concurrent or jointly responsible parties.

This principle is explained through the historical development of the maritime law in America. In this regard, Benedict states:

> "The doctrine of the personality of the ship may be described as a fiction, but the fiction is rather in the mode of expression, than in the substance of the law. The principle is that one . . . who through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship. (Citing Kruass Bros. Lumber Co. v. The Pacific Cedar, 290 U. S. 117, 78 L. ed. 216; 54 Sup. Ct. 105) . . . The ship is so much an independent enterprise, a juridical

aggregate of rights and liabilities that her creditors virtually go shares in her; . . . A maritime lien is the necessary basis for every admiralty proceeding in rem. Such a lien is a right of property and not a mere matter of procedure:" 1 Benedict on Admiralty, pp. 17-18.

"Maritime liens differ from common law liens in a very important point. A common law lien is always connected with a possession of the thing; it is simply a right to retain. On the other hand, a maritime lien does not in any manner depend upon possession. It is a right affecting the thing, and giving a sort of proprietary interest in it, and a right to proceed against it, to recover that interest." 1 Benedict on Admiralty, p. 24.

The independent liability of a ship has been established against various factual backdrops. Thus, a good-faith purchaser of a vessel may have his ship arrested and sold even though he is subject to no in personam liability since the maritime lien adheres to the property. See *The Bold Buccleugh*, 7 Moore P. C. 267 (1861); 1 Benedict, Admiralty, page 25. A vessel under a bareboat charter is liable in rem to an injured party, despite the lack of control on the part of the owner. *The Barnstable*, 181 U. S. 464 (1901); *United States v. The Helen*, 164 F. 2d 111 (2 Cir. 1947); *Davis v. M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md. 1951). Ships have been forfeited for statutory violations even though there has been no privity or knowledge on the part of the owner. *The Little Charles*, 26 Fed. Cases 979, Case No. 15,612 (C. C. D. Va. 1819); *The Malek Adhel*, 43 U. S. (2 How. 210 (1844)).

Mr. Justice Holmes, in The Common Law, drew from the case of *The Ticonderogo* (Swabey 215, 217) to illustrate the liability of a vessel in rem under charter for collision damages even though the vessel owner could not be held liable for said damage and from *The China*, 74 U. S.

(7 Wall.) 53 (1869), wherein this Court held the vessel liable for collision damage even though she was under the control not of her owner, but of a pilot whose employment was compulsory under the laws of the port. See further *Logue Stevedoring Co. v. Dalzellance,* 198 F. 2d 369 (2 Cir. 1952).

By way of further illustration of the ship's personality, Chief Justice Marshall in *The Little Charles,* 26 Fed. Cases 979, 982, quoted with approval by Mr. Justice Story in *The Malek Adhel,* 43 U. S. (2 How.) 210 (1844), stated:

> "This is not a proceeding against the owner, it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the Master. The vessel acts and speaks by the Master. She reports herself by the Master. It is, therefore, not unreasonable that the vessel should be affected by this report. . . . The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing."

Perhaps the clearest exposition of the independent personality and liability of a vessel is found in the historical review by Mr. Justice Holmes in The Common Law pages 25 to 32, wherein it is stated:

> "A ship is the most living of inanimate things. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the Maritime Law can be made intelligible, and on that supposition they at once become consistent and logical." pp. 26-27.

This Court, speaking through Mr. Justice Reed, stated:

> ". . . Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court . . ." *Canadian Aviator Ltd. v. U. S.*, 324 U. S. 215, 224, 89 L. Ed. 901, 908 (1945). See also, *Atlantic Steamer Supply Co. v. The SS Tradewind*, 153 F. Supp. 354, 357 (D. Md. 1957).

Likewise, a vessel must respond in rem for damage caused during a demise charter. When this question first came before this Court, it was an accepted fact that *in rem* liability existed and the only issue indicated was whether the owner or demisee bore the ultimate responsibility under the charter party. *The Barnstable*, 181 U. S. 464 (1901). See also *Logue Stevedoring Co. v. Dalzellance*, 198 F. 2d 369 (2 Cir. 1952); *Davis v. M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md. 1951); *United States v. The Helen*, 164 F. 2d 111 (2 Cir. 1947).

Burns Bros. v. Central Railroad Co. of N. J., 202 F. 2d 910 (2 Cir. 1953) involved a parallel situation. In that case, libellant's barge was negligently injured by a car float owned by the Central Railroad of New Jersey, which was being operated by the Long Island Railroad. At that time Central Railroad was undergoing reorganization so that process in rem might not have been obtainable. After a decree in personam was rendered against Long Island, it went into reorganization. The libellant was then in the same position as the petitioner is here. Central had no in personam liability and Long Island had its liability limited. A subsequent suit in rem was permitted because a lien had arisen by the violation of a duty by one in control.

Further, even though a shipowner may not be liable in personam where the vessel is demised by a bareboat charter and the unseaworthiness arises after the demise,

the vessel itself is liable. Thus in *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794 (2 Cir. 1949), cert. den. 338 U. S. 859, it was stated at page 796:

> "If the demisee becomes liable for breach of warranty of unseaworthiness, a maritime lien arises upon the ship securing the obligee. Regardless of whether such lien arises when the demisee becomes liable for other default, we cannot doubt that one does arise when, as here, the liability is imposed in lieu of a warranty of seaworthiness, and upon the theory that, even where there is such a warranty, the resulting liability sounds in tort. Since the lien extends to unseaworthiness supervening after delivery, as well as that already existing, the owner demisor, so far as his ship will answer, is initially subject to a larger liability than is subject to under the putative imposed liability, although in cases of supervening unseaworthiness the eventual loss would no doubt fall on the demisee."

In *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956) a longshoreman, injured aboard a vessel owned by the United States, but demised to his employer under a bareboat charter agreement, filed a libel in rem against the vessel. The unseaworthiness arose after the demise and, therefore, Judge Hand ruled that an in personam action could not lie against the owner of the vessel. Despite this lack of an underlying in personam liability, Judge Hand ruled that a maritime lien could be imposed upon the vessel. He stated that the claim based upon a maritime lien was upon a different cause of action from that which arose in personam. Thus, in a factual situation precisely the same as that at bar, the Second Circuit, speaking through Judge Learned Hand, could see no reason why the vessel could not be subjected to in rem liability in a situation where there was no underlying in personam liability. See also *Leotta v. The Esparta*, 188 F. Supp. 168 (S. D. N. Y. 1960).

The cases of *Latus v. United States*, 277 F. 2d 264 (2 Cir. 1960), and *Noel v. Isbrandtsen*, 287 F. 2d 783, by contrast further illustrate this point. Both cases involved vessels which were out of navigation. Accordingly, no warranty of seaworthiness could possibly arise. See *West v. U. S.*, 361 U. S. 118 (1959). Therefore, in both cases it was held that there could be no possible recovery in view of the fact that there was no duty breached. In *Latus*, Judge Hand stated that "a longshoreman might sue a ship in rem if he was injured by her unseaworthiness which no one denied." And in *Noel*, Chief Judge Sobeloff stated:

> ". . . It is one thing to hold that a conviction or liability in personam is not a condition precedent to the action in rem; it would be quite another to say that the vessel may be held accountable as an entity where there has been no violation of the warranty of seaworthiness or a breach of duty on the part of anyone."

Norris, in his Law of Seamen, summarizes the ruling case law as follows:

> ". . . The maritime lien gives the lienor a right of action against the vessel herself and ignores the owner personally. The ship is personalized. . . . A lien is given . . . and made on the strength of the vessel as security. *Thus the vessel can be held liable on a lien even though the owner may not be personally liable*, as a debt incurred on the credit of the ship by a charterer under a demise charter. The maritime lien, . . . has been created by law for the purpose of furnishing wings and legs to the vessel . . ." 1 Norris, Law of Seamen (1951), p. 462. (Emphasis supplied.)

In summary, therefore, under the American maritime law, a lien attaches against the vessel in cases of personal injury resulting from the vessel's torts and the vessel is the responsible personality and is itself held accountable for

the damages.[1] This liability arises independent of any liability of the owner and is not dependent upon or related to concepts of in personam liability

The sole basis for destroying the petitioner's maritime lien in the case at bar was the fact that the charterer was also the stevedore-employer, whose exclusive liability to its employees was circumscribed by the Longshoremen's and Harbor Workers' Act. In concluding that there was no in rem liability without a correlative in personam liability, the Court below relied upon the case of *Smith v. The Mormacdale*, 198 F. 2d 849 (3 Cir. 1952), and ignored the dictates of this Court in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928), and *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946).

It was in the *Pinar del Rio* case that this Court laid down the rule that a maritime lien must precede any *in rem* liability of a vessel. There, the plaintiff, a seaman, sued the vessel in rem under the Jones Act, 46 U. S. C. A. 688. This Court held that since the Jones Act did not expressly create a lien against the vessel, none could be inferred and, therefore, no action in rem could exist under that legislation. The Court ruled, however, that the seaman did have two avenues of approach: an action *in personam* against the employer under the maritime law as modified by the Jones Act, or his existing action *in rem* against the vessel under the general maritime law which provided the necessary lien which remained unaffected by the Jones Act. It

1. *The Palmyra*, 25 U. S. (12 Wheat.) 1, 6 L. Ed. 531 (1827); *U. S. v. Malek Adhel*, 43 U. S. (2 How.) 210, 11 L. Ed. 239 (1844); *The China*, 74 U. S. (7 Wall.) 53, 19 L. Ed. 67 (1869); *The John G. Stevens*, 170 U. S. 113, 42 L. Ed. 969 (1898); *The Barnstable*, 181 U. S. 464 (1901); *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 760 (1903); *Canadian Aviator, Ltd. v. U. S.*, 324 U. S. 215, 89 L. Ed. 901 (1945); *Cannella v. Lykes Bros. Steamship Co.*, 174 F. 2d 794 (2d Cir. 1949); *Carbon Black Export, Inc. v. S. S. Monrosa*, 254 F. 2d 297 (5th Cir. 1958); *Crumady v. J. H. Fisser*, 358 U. S. 423, 3 L. Ed. 2d 413; 1 *Benedict on Admiralty*, 17 et seq.; *Gilmore and Black, The Law of Admiralty*, Chap. IX (3), p. 494; 1 Norris, *Law of Seamen* (1951), p. 462; *Robinson on Admiralty* (1939), pp. 364, 312.

was reasoned that the new statute, not expressing a change in existing rights, could have no effect upon them.

The Longshoremen's Act similarly created an *in personam* liability for compensation against the employer without creating any right of lien against the vessel. Just as the Jones Act, it left unchanged any already established lien rights. It gave the longshoremen new statutory rights against his employer *in personam* and gave the latter a defense against damage actions *in personam*. Thus, the rights of the longshoremen, except as limited by statute, remain unaffected either "by construction, analogy or inference" (cf. *The Pinar del Rio*, U. S. at 156, L. Ed at 829). Accordingly, the longshoreman, as the seaman, may invoke his remedy against the ship under the general maritime law or they may make claim against their employers under the Compensation Act. Thus, as the Jones Act, which applied to the employer-employee relationship, has no effect upon the seaman's right *in rem* against the vessel, neither does the Longshoremen's Act affect the longshoreman's right in that regard. The *Pinar del Rio* treated the vessel as a separate and distinct legal entity.

Subsequently, in *Seas Shipping Co. v. Sieracki*, 328 U. S. 50 (1946), the Supreme Court reconfirmed the continuation of these rights. The Court said at 102:

> "We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer . . . But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against their persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone."

It must be noted that the Supreme Court in *Sieracki* limited the effect of the Longshoremen's and Harbor

Workers' Act to the employer alone. In recognizing the continued existence of all prior rights other than against the employer, this Court cited with approval *The Pacific Pine*, 31 F. 2d 152, 155 (W. D. Wash. 1929) which held that the ship is a third person against whom the longshoreman may bring his libel in rem.

It was the recognition of this line of authority by Chief Judge Biggs which caused him to state:

> "The majority view that no *in rem* obligation came into existence because there was no subsisting *in personam* obligation is untenable. The majority view seems to be contrary to the reasoning of the Supreme Court in Plamals v. The Pinar Del Rio, 277 U. S. 151 (1926), and Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946). A bare-boat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable absolute duty to maintain the vessel in a seaworthy condition. A charterer under circumstances such as those at bar does not gain immunity because of the Longshoremen's and Harbor Workers' Compensation Act. I think the case is wrongly decided for it takes away from the longshoreman the very important protective waranty of seaworthiness and limits Sieracki greatly."

The Court below placed its prime reliance upon its prior decision in *Smith v. The Mormacdale*, 198 F. 2d 849 (3 Cir. 1952). An analysis of that opinion indicates its total inapplicability to the factual situation at bar. The Court in *Smith* decided a case where the vessel was the property of the employer and held that in such an action, the suit against the vessel was really against the employer who was protected from liability by the Longshoremen's Act. In *Smith*, the Court of Appeals for the Third Circuit made it abundantly clear that only where the shipowner was also the employer did that statute lend its protective

cloak. That this is the true analysis of the *Smith* case is necessarily buttressed by Judge Staley's dissent from the denial of rehearing in the case at bar. Judge Staley, the author of the opinion in *Smith*, dissented in this case because he felt the concept set forth in *Smith* should not apply to a case where the employer was not also the shipowner.

In the instant case, the Court has applied *Smith* to a situation where the employer is not the shipowner, but a bareboat charterer. It felt that the distinction was not significant in view of the fact that demisee acquired control of the vessel. However, the demisee does not acquire ownership of the vessel. The owner retains his title and his pecuniary interest in the vessel and its operation. See *Guzman v. Pichirilo*, 369 U. S. 895 (1962). He continues to have the obligation that the vessel be seaworthy as this obligation remains non-delegable, continuing, and the shipowner is not relieved thereof by giving up control of the vessel. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

The mechanism of a lease of the vessel does not destroy the interest of the owner nor his concomitant non-delegable obligations. The owner's interest remains and so does the longshoreman's right of lien against the vessel of which the owner holds title. The distinction between a charterer-employer and an owner-employer is both significant and substantial. The charterer may take the owner's control, but not his ownership and related obligations. Ownership *pro hac vice* does not involve passage of title nor does it require the vessel to be returned to the rightful owner free of lien. Significantly, the demise does not make the longshoreman the employee of the owner.

Nor is it material that the employer may ultimately have to pay. Ultimate payment in this case arises out of a contract of indemnity between the shipowner and the charterer-employer. As the liability over is traceable to the contract, Pan-Atlantic cannot realistically argue that this in rem action against the vessel is an action against

itself. It cannot raise the exclusive protection of the Compensation Act to offset its contracted-for liability which it has voluntarily and clearly assumed. While the defense of a Compensation Act is a personal defense of Pan-Atlantic, it must be remembered that Pan-Atlantic is not being sued, its vessel is not liable for the damages, and its reimbursement to the vessel for unseaworthiness which may have arisen during the demise is immaterial to the case at hand. See *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, 350 U. S. 124 (1956). It was there contended that since the employer's obligation was exclusive under the Compensation Act, the employer could not be bound to pay ultimately. Mr. Justice Burton concluded that the exclusive liability provision of the Compensation Act did not protect the employer against claims based on contractual rights of indemnification. See also *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (3 Cir. 1953).

Yet, several of the Justices of this Court were reluctant to concur in *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, 350 U. S. 124 (1956), for fear that the placing of ultimate responsibility on the stevedore on the basis of breach of warranty of workmanlike performance would vitiate the underlying basis for the unseaworthiness doctrine as expressed in *Sieracki*. When the protective scope of the unseaworthiness doctrine was broadened to include longshoremen, this Court observed:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workman within

the scope of its policy." *Seas Shipping Co. v. Sieracki*, supra, 328 U. S. 85 at page 100.

Since it is clear that compensation statutes were enacted to enlarge workers' rights, not diminish them, we fail to see how the combination of a demise charterer and stevedore-employer relationship can purge the owner of his non-delegable duties and extinguish the worker's right and his lien.

In *Guzman v. Pichirilo*, 369 U. S. 895 (1962), this Court expressly left open the issue of whether "a charter party relieves the owner of his traditional duty to maintain a seaworthy vessel" and "whether the vessel could be held liable in rem when neither the demisee nor the owner was personally liable." In that case certiorari was granted to determine the conflict on that point between the Courts of Appeals of the First and Second Circuits. This Court, in Note 2 cited to the text in *Pichirilo*, specifically referred to the decision in *Reed v. The Yaka* and stated that the Court of Appeals for the Third Circuit "had aligned itself *in toto* with the position of the Court of Appeals for the First Circuit." Accordingly, the need to resolve the conflict between the Courts of Appeals still exists. See *Grillea v. U. S.*, 232 F. 2d 919 (2 Cir. 1956).

Further, if the doctrine of *Sieracki* is to remain viable, this Court must correct the ruling of the Court of Appeals for the Third Circuit and adopt the reasoning of the Court of Appeals for the Second Circuit which imposed in rem liability upon the vessel in situations identical with the one presented on this appeal.

The mechanism of a bareboat charter in cases like the present is a deprivation of a longshoreman's right to a seaworthy vessel. The decision of the Court of Appeals for the Third Circuit permits the owner to insulate himself by a charter and the charterer to protect himself by pleading immunity under the Longshoremen's Act. This deprivation of the protective warranty of seaworthiness conflicts with the principles enunciated by this Court in

Sieracki and *The Pinar del Rio.* It conflicts with the decision of Judge Hand in *Grillea.* It permits the shipowner to deny his continuing and non-delegable duty by a simple device that has been common and is becoming more prevalent. The application of the decision of the Court below makes it unnecessary for a stevedore to be presented with a safe and seaworthy vessel for the combination of the Longshoremen's and Harbor Workers' Act and the demised charter will insulate all parties from liability.

The present decision is such a sharp departure from historically recognized principles of maritime law and so contrary to the characteristic features and humanitarian policies thereof that it should not be permitted to stand without further examination by this Court. It is based on the erroneous view that under the maritime law an action against a vessel is an action against its owner. It literally uproots and overturns the concept of the ship's personality as a distinct juridical entity.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Respectfully submitted,

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Counsel for Petitioner.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

ELIJAH REED, *Appellee,*

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

Appellant in No. 13,600,

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellant in No. 13,601.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 18, 1961
Before: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed April 27, 1962)

By HASTIE, *Circuit Judge.*

Libellant Reed, the appellee here, is a longshoreman who was injured while employed by appellant Pan-Atlantic

Steamship Corporation and engaged in loading the steamship Yaka. The accident occurred in the hold of the ship when a wooden pallet upon which Reed was standing broke. The pallet was part of staging which the longshoremen themselves had brought on board the ship and had erected.

The libel was solely in rem against the Yaka. The ship was and is owned by Waterman Steamship Corporation, which, as owner and claimant, has defended this libel. However, at the time of the accident in suit the ship had been demised to and was being operated by Pan-Atlantic Steamship Corporation as a bareboat charterer. This libel was instituted after the expiration of the demise and the return of the ship to its owner.

The libel was filed in the Eastern District of Pennsylvania at a time when the Yaka was not within that jurisdiction. However, Waterman answered the libel on its merits averring that it "voluntarily appeared as claimant to avoid attachment and delay of the vessel if it should subsequently be present" within the jurisdiction. Waterman also impleaded Pan-Atlantic as the demisee of the ship at the time of the accident, alleging that Pan-Atlantic was obligated to indemnify the ship and its owner for any loss they might suffer as a result of the principal claim.

A trial on the question of liability resulted in a permissible finding that libellant's injury had been caused by an unseaworthy condition created by Pan-Atlantic's employees during the demise. 1960, 183 F. Supp. 69. The court then concluded as a matter of law that, although the Longshoremen's and Harbor Workers' Act prevented Pan-Atlantic from being liable to its employee Reed for breach of warranty of seaworthiness, the ship was nevertheless accountable in rem for the injuries caused by its unseaworthiness. At the same time, liability over was imposed upon Pan-Atlantic. Both Waterman, on behalf of the Yaka, and Pan-Atlantic have appealed.

On this appeal, it is argued for the first time that jurisdiction in rem never attached in this case because the

ship was never arrested and no bond or stipulation for value was ever filed.[1] The second and more fundamental contention of both appellants is that the accident did not and could not subject the ship to any liability in rem because it did not create any personal liability against anyone having an interest in the ship.

The first point requires only brief analysis. While the power of an admiralty court to exercise authority over a ship normally depends upon the arrest of the ship within the court's territorial jurisdiction, a claimant can waive this requirement and consent to jurisdiction so far as its interest in the vessel is concerned. *The Willamette*, 9th Cir. 1895, 70 Fed. 874. See generally 2 BENEDICT, ADMIRALTY, Knauth ed. 1940, § 242. A recent decision of the Supreme Court, *Continental Grain Co. v. Barge FBL-585*, 1960, 364 U. S. 19, is instructive. In that case a ship was beyond the jurisdiction of the court when a proceeding in rem was filed against it. However, the owner, as claimant, gave the libellant a "letter undertaking" stipulating that the rights of the parties would " 'for all purposes be . . . precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* processes, and released by the filing of claim and release bond . . . .' " Id. at 29. The Supreme Court treated this submission as perfecting the jurisdiction of the court. We think the voluntary appearance of the claimant to respond to the libel on its merits in this case was an equivalent and equally effective undertaking that its interest in the ship should be subject to the authority of the

1. This contention is advanced by Pan-Atlantic, which had no interest in the Yaka when this proceeding was instituted against the ship. Waterman, the owner then in possession, has not challenged the venue. In these circumstances, while we shall consider the issue on its merits, the standing of Pan-Atlantic to raise it is at least doubtful. Compare *Ryan Stevedoring Corp. v. Pan-Atlantic S. S. Corp.*, 1956, 350 U. S. 124, where it was made clear that the third-party defendant's rights and duties must be viewed independently of the legal relationship between the longshoreman and the shipowner.

court. *Cf. United States v. Ames*, 1879, 99 U. S. 35; *J. K. Welding Co. v. Gotham Marine Corp.*, S. D. N. Y. 1931, 47 F. 2d 332.

We come now to the basic contention that the imposition of liability on the ship was improper because the accident in suit gave rise to no personal liability.

A similar question was carefully considered and decided by this court in *Smith v. The Mormacdale*, 1952, 198 F. 2d 849, *cert. denied*, 1953, 345 U. S. 908. There the owner and operator of a ship employed a stevedore who was injured as a result of the unseaworthiness of the vessel. Since the Longshoremen's and Harbor Workers' Act, in establishing a workmen's compensation scheme, deprived an injured employee of all other rights against his employer, the injured longshoreman took no action against the shipowner but libeled the ship, claiming that it was directly and independently liable in rem for the consequences of its unseaworthiness. However. this court described such a proceeding against the ship itself as merely a procedural device of admiralty for more readily effectuating the liability of some jural person who has breached some personal obligation, in that case the absolute duty that the law imposes upon a shipowner to maintain a seaworthy vessel. We looked through the fiction of "the so-called independent personality of the ship" and recognized that "an action against the vessel is realistically an action against" the owner, 198 F. 2d at 850. Analytically, there had to be a preexisting maritime lien upon which to base the remedy of recovery from or through the ship, and since the owner-employer was not liable to its injured employee, there was no underlying obligation that could have given rise to such a lien. Accord, *Samuels v. Munson S. S. Line*, 5th Cir. 1933, 63 F. 2d 861; *cf. Continental Grain Co. v. Barge FBL-585*, *supra*. See generally GILMORE & BLACK, ADMIRALTY, 1957, 483-510.

The case at hand is different only in that the suing longshoreman's employer was a bareboat charterer rather than

an owner. But for present purposes that is not a significant distinction. In admiralty such a demisee acquires full control and authority over the ship and the rights and duties which attend such dominion. He takes the owner's place for the term of the demise. *United States v. Shea*, 1894, 152 U. S. 178; *Leary v. United States*, 1871, 81 U. S. (14 Wall.) 607, 610 (dictum); GILMORE & BLACK, *op. cit. supra* at 215-16. Thus, the doctrine of *Smith v. The Mormacdale* is applicable to this case and prevents the present libellant from recovering against the Yaka unless someone other than his employer breached a duty to provide longshoremen with a seaworthy ship.

The only other person who was even arguably so obligated is Waterman. Unquestionably, as owner, Waterman warranted the seaworthiness of the vessel as transferred to the bareboat charterer. *Work v. Leathers*, 1878, 97 U. S. 379. Indeed, the charter so provided. But the unseaworthiness here resulted solely from the subsequent conduct of the demisee's employees in bringing a defective appliance on to the ship. The Court of Appeals for the Second Circuit has recently considered this very problem and has ruled, correctly we think, that an owner is not liable for unseaworthiness, originating and causing injury while a demisee is operating a ship. To that court it seemed neither fair to the demisor nor necessary to protect those who should deal with the ship during the term of the charter that this type of liability without fault should "extend beyond the demisee, on whose initiative and for whose profit the venture had been undertaken . . . [to] include the demisor, who has done no more than put the demisee into possession of the ship . . . ." *Grillea v. United States*, 2d Cir. 1956, 229 F. 2d 687, 690. We think this position is sound and, therefore, that libellant cannot base his action on any warranty by Waterman that its demisee would not bring aboard unseaworthy appliances.

Thus, analyzed, this suit is an attempt to use the procedural device of a libel in rem against a ship for injury

caused by its unsafe condition in the absence of any underlying obligation of anyone to respond in damages for breach of warranty of seaworthiness. In essence libellant is asserting that a maritime lien has arisen in his favor though he cannot show any lien-creating obligation. In these circumstances, we think the libellant was not entitled to recover.

We recognize that a contrary result has been reached by the Court of Appeals for the Second Circuit. *Grillea v. United States*, 232 F. 2d 919. It seems to us, however, that this result was achieved by incorrectly treating the fictional personification of the ship as something more than the procedural device that it is. The same problem subsequently came before the Court of Appeals for the First Circuit in *Pichirilo v. Guzman*, 290 F. 2d 812, cert. granted, 1961, 368 U. S. 895. Disagreeing with Grillea, that court reasoned as we do that the absence of any lien-creating personal obligation of the demisor or the demisee precluded any recovery against the ship in rem.

The judgment will be reversed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,600; 13,601

ELIJAH REED

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

Appellant in No. 13,600;

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Appellant in No. 13,601.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

Attest:
IDA CRESKOFF
Clerk

April 27, 1962

Received and Filed
Apr 27 1962
Ida O. Creskoff,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

ELIJAH REED,
Appellee

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),
Appellant in No. 13,600

and

PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellant in No. 13,601.

Present: BIGGS, *Chief Judge;* and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges.*

OPINION OF THE COURT ON PETITION FOR REHEARING.

(Filed July 16, 1962)

PER CURIAM:

The petition for rehearing presents nothing of significance that was not fully considered in deciding this appeal.

The petition is denied.

BIGGS, *Chief Judge*, dissenting.

The majority view that no *in rem* obligation came into existence because there was no subsisting *in personam* obligation is untenable. The majority view seems to be contrary to the reasoning of the Supreme Court in Plamals

v. The Pinar Del Rio, 277 U. S. 151 (1926), and Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946). A bare-boat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable absolute duty to maintain the vessel in a seaworthy condition. A charterer under circumstances such as those at bar does not gain immunity because of the Longshoremen's and Harbor Workers' Compensation Act. I think the case is wrongly decided for it takes away from the longshoremen the very important protective warranty of seaworthiness and limits Sieracki greatly.

But quite aside from the foregoing, the Supreme Court in Guzman v. Pichirilo, 369 U. S. 698 (1962), expressly left open the issue of whether "a charter party relieves the owner of his traditional duty to maintain a seaworthy vessel." Moreover, the Supreme Court in note 2 cited to the text in Pichirilo specifically referred to our decision in the instant case and stated that we "had aligned ourselves in toto with the position of the Court of Appeals for the First Circuit." See 290 F. 2d 812 (1961). I think that the importance of the case at bar justifies rehearing by the court en banc. I therefore must respectfully dissent from the order refusing to grant rehearing.

STALEY, *Circuit Judge*, dissenting.

I join Chief Judge Biggs in his conclusion in his dissent. I read his dissent as not disturbing Smith v. The Mormacdale, 198 F. 2d 849 (C. A. 3, 1952), where the employer was also the shipowner.

IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT STEAMSHIP YAKA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 509

ELIJAH REED,

Petitioner

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

BRIEF FOR RESPONDENT STEAMSHIP YAKA.

QUESTION PRESENTED FOR REVIEW.

May a vessel be held liable in rem for damages arising from shipboard injury to a longshoreman, caused by an unseaworthy condition created by the demise charterer who is also the longshoreman's employer?

STATEMENT OF THE CASE.

Steamship YAKA, owned by Waterman Steamship Corporation, was delivered under a demise charter to Pan-Atlantic Steamship Corporation on March 19, 1956. Petitioner was injured on March 23, 1956, while employed by the demisee to load cargo aboard the ship at Philadelphia.

The trial judge found that the accident occurred because of the defective condition of a pallet which Pan-Atlantic's longshoremen were using as a platform in the hold to expedite their work. The pallet was not part of the regular equipment of the vessel. It had not been aboard the vessel when the ship was delivered to the demise charterer six days previously. On the contrary, the evidence was undisputed that the wooden pallet was a loading device owned and furnished by the demisee, and used to transfer drafts of cargo from shore into the hold of the vessel on the day of the accident.

Petitioner sued Waterman Steamship Corporation as owner, alleging that the duty to furnish a seaworthy ship and equipment was absolute and non-delegable, even where the unseaworthy condition was created by the demisee and did not exist at the time of the demise. This contention was rejected by the District Court on peremptory exception to the libel, but the exception was dismissed on the ground that evidence might be presented at trial to disclose some connection between the shipowner and the faulty equipment.

Petitioner thereupon instituted the present action in rem against the vessel, which impleaded the demise charterer. The suit in personam and the separate action in rem were consolidated for purposes of trial, and at the close of the testimony the trial judge granted the motion of Waterman Steamship Corporation for dismissal of the in personam suit since it was clear that the unseaworthy condition had been created entirely by Pan-Atlantic Steamship Corporation.

Thus recognizing that there was no in personam liability on the part of Waterman as shipowner, the trial judge nevertheless found Steamship YAKA liable in rem and allowed full indemnity in favor of the ship against the demisee.[1]

Pan-Atlantic appealed on the ground that its status as demise charterer was tantamount to ownership (see *Guzman v. Pichirilo*, 369 U. S. 698 (1962)) and that the fiction of an independent in rem liability could not be utilized to circumvent the protection afforded a stevedore employer by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code, Section 901 et seq. The Third Circuit had already decided that the registered owner of a vessel who performed his own stevedoring could not be deprived of this protection by the device of attaching his vessel on the theory of a maritime lien. *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), certiorari denied 345 U. S. 908 (1953).

Steamship YAKA likewise appealed to protect its position on the separate judgment for indemnity.

The Court below reversed the District Court, holding that petitioner had attempted to use the procedural device of a libel in rem against a ship for injury in the absence of "any underlying obligation of anyone" to respond in damages.

Although in either event Steamship YAKA will not be required to bear the loss, it is the position of this respondent that the conclusion of the Court below was correct as a matter of law, and that this petition for writ of certiorari should be denied.

---

1. The demise charter expressly provided for indemnity, in addition to the established breach of Pan-Atlantic's implied warranty to the owner to perform its services in a safe, proper and workmanlike manner. *Crumady v. J. H. Fisser*, 358 U. S. 423 (1959); *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (1956).

ARGUMENT.

I. There Is No Conflict With the Prior Decisions of This Court, or With the Most Recent Decisions in Other Circuits.

Petitioner's assertion that the decision of the Court below conflicts with prior decisions of this Court, and with other decisions in the Second Circuit, is untenable.

Plamals v. S. S. Pinar del Rio, 277 U. S. 151 (1928), decided no more than the inapplicability of in rem proceedings to litigation arising under the Jones Act, which it was held did not create a maritime lien in favor of an injured seaman such as existed under general maritime law. The maritime lien "cannot be extended by construction, analogy, or inference."

The decision confirms the admiralty doctrine that in rem proceedings are predicated on the existence of a maritime lien. But it does not follow that a maritime lien exists in the absence of in personam liability of the shipowner.

The Court below in the present case disposes of that open question by holding that a maritime lien is essentially a means of enforcing in personam liability against the owner or other person responsible for the operation of a vessel, a question which this Court did not reach in *Guzman v. Pichirilo,* 369 U. S. 698, 700 (1962).

In *Seas Shipping Co., Inc., v. Sieracki,* 328 U. S. 85 (1946), this Court held that the rights of a seaman against his maritime employer under general maritime law were extended to longshoremen while engaged in performing the traditional duties of crew members. This suit was on the "law side" of the court and did not involve, nor did it discuss, maritime liens or proceedings in rem.

Petitioner also relies on the conflict, admitted by the Court below, with the opinion of Judge Learned Hand in *Grillea v. United States,* 232 F. 2d 919 (C. A. 2, 1956), fol-

lowed by the District Court in the present case and in *Leotta v. S. S. Esparta*, 188 F. Supp. 168 (S. D. N. Y., 1960).

The opinion in *Grillea* first holds that the cause of action in rem and in personam is in substance identical (at page 921). The court then observes that the question of the validity of a maritime lien against a vessel without underlying personal liability of the shipowner is without known precedent (at page 924): "although as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'."

Judge Learned Hand indicated an alteration of this viewpoint four years later in *Latus v. United States*, 277 F. 2d 264, 267 (C. A. 2, 1960), where he said:

> "We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner, when that fault is not that of a 'bare-boat' charterer, or of some specified class of persons like a compulsory pilot."

In *Pichirilo v. Guzman*, 290 F. 2d 812, 815 (C. A. 1, 1961), the First Circuit refused to follow *Grillea*, pointing out that the comment of Judge Hand was unsupported by authorities, and was indeed contrary to other statements he had made on the same subject.

The First Circuit in *Pichirilo* concluded that a longshoreman, employed by a demisee, had no right of action against either the shipowner or his own employer and consequently could not assert a maritime lien against the vessel. The First Circuit thereby placed itself squarely in accord with the Third Circuit in the present case. However, this Court in *Guzman v. Pichirilo*, 369 U. S. 698 (1962), found that there was no demise, and reversed on that ground. In the dissenting opinion, at pages 703 and 704, Mr. Justice Harlan stated that the reversal had been decided on questions of fact, but that on the law questions which this Court did not decide the Court below was "plainly correct."

Under Judge Hand's decision in *Latus, supra,* and the relevant conclusions of law by the First Circuit in *Pichirilo, supra,* both of which were subsequent to *Grillea,* there is no conflict between the circuits, and the cited prior decisions of this Court have no bearing on the main issue presented by this petition.

II. The Court Below Was Correct in Holding That a Maritime Lien Depends Upon Some Underlying Personal Obligation of the Shipowner or Other Person Responsible for Operation of the Ship.

The purpose of a maritime lien is justice and convenience to an injured party, whereby he may assert what is in substance a claim against the shipowner or other person responsible for the ship. In *The Anaces,* 93 Fed. 240, 244 (C. A. 4, 1899), the court said:

> "The owners of the vessel almost invariably are unknown and inaccessible. To require the libelant to serve process on them is practically to deny him any remedy. Under the statutes of the United States, the owners of all vessel property, foreign and domestic, are given, to the fullest extent, the privilege of limiting their liability to the value of their interest in the vessel. The injured party cannot touch their property, outside of their interest in the ship, if they claim to limit their liability; and there are strong reasons of justice and convenience why he should have a maritime lien upon that specific property, and why distinctions, not founded in reason, between claims of the same general merit, should not gain a place in a system of jurisprudence which is intended to approach natural justice."

Personification of the ship does not assume that the ship itself has authority to warrant its own seaworthiness independently of her owner or demisee. It is a well-accepted principle of maritime law that a shipowner gives

an implied warranty of seaworthiness to the crew hired to navigate the vessel, and, under later extension of this doctrine, to longshoremen and others carrying out the traditional work of the crew in loading and unloading cargo. No case, however, holds that a ship in its own right makes a separate warranty of seaworthiness, so that the injured party has two separate and distinct causes of action, one arising against the ship and the other against her owner.

Nor does personification compel courts to adopt the sophistry that arrest of the ship on a libel in rem has no relation to the interest of her owner. The ship is the owner's property. Use of the ship in trade is the only justification for ownership of a cargo vessel. When she is arrested, her owner's property is seized and his expectable profits are suspended or lost. The owner's property rights in the *res* and the earnings therefrom cannot be justly infringed without some alleged breach of duty on his part. Seizure of the vessel without such claim amounts to forfeiture.

This Court has held that a proceeding in rem is "a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited." *Boyd v. United States*, 116 U. S. 616, 637 (1886).

No breach of duty can be asserted against the shipowner in the present case. The record is clear that the cause of petitioner's injury was a defective wooden pallet owned, used, and brought on board the ship by the demisee who was acting as his own stevedore to load the cargo. Nothing connected with the YAKA when she was delivered under the demise charter caused or contributed to the accident.

There is no authority for petitioner's contention that the shipowner remains liable for any unseaworthy condition arising during the demise, such as may be created by

the demisee's own equipment used in his business. The District Court ruled in the petitioner's personal action against Waterman that the owner's obligation to furnish a seaworthy vessel did not extend to conditions created by the bareboat charterer, citing *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794 (C. A. 2, 1949); *Grillea v. United States*, 229 F. 2d 687 (C. A. 2, 1956); and *Grillea v. United States*, 232 F. 2d 919 (C. A. 2, 1956). The Court below in this case (see Opinion annexed to Petition, page 21) cited and followed the first *Grillea* decision, 229 F. 2d at 690, stating:

> "To that court it seemed neither fair to the demisor nor necessary to protect those who should deal with the ship during the term of the charter that this type of liability without fault should 'extend beyond the demisee, on whose initiative and for whose profit the venture had been undertaken * * * (to) include the demisor, who had done no more than put the demisee into possession of the ship.' "

The demise charterer takes over possession, command and navigation of the vessel; his position is "tantamount to, though just short of, an outright transfer of ownership." *Guzman v. Pichirilo, supra*, at page 700. In the present case, unlike *Guzman v. Pichirilo*, there was definitely a demise and the petitioner does not raise that issue.

Should the demise not relieve the shipowner from his responsibility for unseaworthy conditions created by the charterer, the owner would become liable for accidents arising under conditions over which he had no control, anywhere in the world, and for long periods of time after the owner last had possession. The shipping industry should not be burdened with such extraordinary risks.

In the absence of personal liability of the owner, in rem attachments have been refused. Instances include vessels in custody of the law: *New York Dock Co. v. S. S. Poznan*, 274 U. S. 117 (1927); where the owner is a sovereign power: *The Western Maid*, 257 U. S. 419 (1922); and where the owner's liability was barred by statute: *Consumers Import*

Co. v. Kabushiki Kaisha, 320 U. S. 249 (1943). In the last-named case, this Court quoted from *The City of Norwich*, 118 U. S. 468 (1886), at page 502:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles."

Following this quotation, the Court commented (320 U. S. at page 253) that: "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age." This case expressly overruled *The Etna Maru*, 33 F. 2d 232 (C. A. 5, 1929), which held that the ship could be liable in rem regardless of the liability of her owner.

Petitioner's contention that the shipowner's warranty of seaworthiness is absolute and non-delegable even while the ship is demised concedes that a maritime lien is predicated upon the personal obligation of the owner, as the foregoing cases held.

Since there is no doubt that the accident was caused by equipment of the demisee, the shipowner has no personal responsibility; and the responsibility of the demisee as the employer of the longshoreman is barred by the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Consequently, petitioner has no basis for a maritime lien which would support an action in rem against Steamship YAKA, and he may resort to his adequate statutory benefits under the Longshoremen's Act.

CONCLUSION.

The Court below was correct in deciding that petitioner had no underlying personal obligation involving either the shipowner or the demise charterer which would create a maritime lien against the demised vessel. Without a maritime lien, the vessel cannot be sued in rem or made independently responsible in damages for the alleged tort.

There are no contrary rulings in prior decisions of this Court. Many decisions, above cited, support the requirement of a personal obligation of the owner. The contrary conclusion of Judge Hand in the second *Grillea* decision in 1956 is contradicted by his later ruling in *Latus* in 1960; and the First Circuit, which is in accord with the Court below in this case, was not overruled by this Court in *Guzman v. Pichirilo*, which was reversed on other grounds.

Fictional personification of the ship is essentially a procedural device to serve the ends of justice and convenience. It does not create a legal entity which can warrant seaworthiness or commit torts. The petition should therefore be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT PAN-ATLANTIC STEAMSHIP CORPORATION IN OPPOSITION TO THE PETITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT)

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, PAN-ATLANTIC STEAMSHIP CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

On March 23, 1956, this respondent, Pan-Atlantic Steamship Corporation [hereinafter Pan-Atlantic] was the owner *pro hac vice* of the S. S. YAKA. The ship had been

delivered to Pan-Atlantic by its owner, Waterman Steamship Corporation [hereinafter Waterman] on March 19, 1956, pursuant to the terms of a charter agreement [bareboat] under which Waterman demised the ship to Pan-Atlantic for a period of time.

On March 23rd, the libellant, an employee of Pan-Atlantic, was engaged in loading the vessel. He and other employees of Pan-Atlantic were using Pan-Atlantic's equipment, including wooden pallets. Those were described by the district court [finding of fact 13 (59a),[1] 183 F. Supp. 69 at 70] as cargo trays, constructed of strips of boards approximately an inch thick, nailed to blocks at each end and reinforced at the corners, making a rectangular pallet about four feet wide, six feet long and four inches high. Pallets of this type are commonly used for loading cargo in the Port of Philadelphia. The practice is that the cargo is placed upon these pallets on the pier—the pallet with the cargo on top of it then being lifted into the hold where the cargo is then removed and stowed. The district court found that the particular pallets all belonged to Pan-Atlantic and that use of the pallets "was the customary, and proper, practice when loading cargo of this nature". The district court found [finding 38] that the pallet which broke when the libellant's foot was on it contained a defect which had existed when it was brought on board the ship a few moments before. It was also found [finding 40] that "the sole cause of this injury was the latent defect in this wooden pallet . . ." The district court found that the existence of this pallet with a defect rendered the S. S. YAKA unseaworthy [finding of fact 41]. There was no finding, and no contention, that the ship itself was defective or in any way unfit.

The officers and crew of the ship were all employees of Pan-Atlantic and so were the longshoremen engaged in

1. In referring to the record we refer to the appellants' consolidated appendix printed for use in the court below followed by the suffix "a". There is printed also an appendix to their brief in opposition to which we will refer with the suffix "z".

loading the vessel. In addition to owning and operating ships [compare *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (1956)] Pan-Atlantic, from time to time, enters into charters under which it becomes the owner *pro hac vice* of vessels owned by other companies.

In ports where the volume of business warrants it, Pan-Atlantic has its own stevedoring division which handles the loading and unloading of its ships. It handles its owned vessels in the same way as it handles ships of which it is owner *pro hac vice*, as in the case at bar.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I. The Decision of the Court of Appeals Is Not Violative of the Concepts Enunciated by This Court in Any Prior Decision.

The petitioner asserts that the decision below violates the concepts of decisions set by this Court in *Plamals v. The Pinar Del Rio*, 277 U. S. 151 [1928]. That decision, at least partially disapproved since,[2] had nothing to do with the question involved in the case at bar. It merely determined that the Jones Act, 46 U. S. C. A. § 688, imposed personal liability and gave no lien which could be the subject matter of an *in rem* action. The Court in *Plamals v. The Pinar Del Rio* would seem to disapprove the contention this petitioner advances, for at one point in the decision it was stated:

> "To subject vessels during all of the time allowed by the statute of limitations to secret liens to secure undisclosed and unlimited claims for personal injuries by every seaman who may have suffered personal injury thereon would be a very serious burden. One desiring to purchase, for example, could only guess vaguely concerning the value. 'An act to provide for the promotion and maintenance of the American Merchant Marine' ought not to be so construed in the absence of compelling language." 277 U. S. 151 at 157.

There is nothing about *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, which has the remotest bearing upon the issue presently before the Court. Exactly the opposite is true. In *Sieracki*, the Court recognized th[illegible] the Longshoremen's and Harbor Workers' Compensati[illegible] Act, 33 U. S. C. A. 901 et seq., did restrict and nullify the right of an injured

2. *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 at 105.

longshoreman against the owner of the ship where the owner was also the employer. The Court noted, 328 U. S. at 102, that the situation where the shipowner was also the employer was "presumably rare", but this is that rare case where the longshoreman is in fact in the employ of the owner *pro hac vice* of the vessel.

II. There Is Not Conflict Among the Circuits.

The petition suggests that the decision in the case at bar is in what petitioner calls "direct conflict" with the decision of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919. The petitioner fails to note that this does not establish conflict at the present time, for a careful examination will reveal that *Grillea* is no longer followed by the Second Circuit, and has been either disapproved or overruled, *sub silentio*.[3] Therefore, conflict does not now exist.

The logic of the decision in *Grillea v. United States*, 232 F. 2d 919, is, at best, obscure. The case has a peculiar history. In the district court it had been dismissed in an unreported opinion by Judge Ryan. One of the grounds for dismissal was that the United States, the owner, "having demised the vessel, was not liable for any unseaworthiness that resulted . . . after the vessel had been delivered." 229 F. 2d 687 at 689. The Court of Appeals for the Second Circuit, therefore, affirmed the judgment of dismissal. *Grillea v. United States*, 229 F. 2d 687.

Thereafter a petition for rehearing was filed, and the Court entered an order upon rehearing which is not officially reported. It is reported 1956 A. M. C. 1227, and is reproduced herein [1z]). It is the opinion in *Grillea* following rehearing, 232 F. 2d 919, which is asserted as in conflict with the holding in the case at bar. It is in that opinion that Judge Hand, speaking for a two to one majority [Judge Swan dissenting] said that he "could see

3. The Fourth Circuit has so conceded. See *Noel v. Isbrandtsen*, 287 F. (2) 783 (1961) at 786 particularly footnote 6.

no reason why a person's property should never be held liable unless he or someone else is liable *in personam*".

That *Grillea* decision was written in 1956. It is more difficult to comprehend when compared with the decision of the same court [composed of identical personnel with Judge Hand writing the opinion] in *Burns Brothers v. Central R. R. of New Jersey*, 202 F. 2d 910 (1953). In that case the court held that after there had been a determination of a suit *in personam*, a second suit *in rem* could not be successfully maintained. Said the Court:

> "Disputes arise between human beings, not inanimate things; and it would be absurd to give the beaten party another chance because on second trial he appears as the claimant to a vessel that is, and can be, nothing but the measure of his stake in the controversy." 202 F. 2d 910 at 913.

In 1960, Judge Hand again wrote the unanimous decision for the Second Circuit in *Latus v. United States*, 277 F. 2d 264. In *Latus* he said:

> ". . . , an implied liability in rem, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and as has been often quoted, 'a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong. The Eugene F. Moran, 212 U. S. 466'. We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner when that fault is not that of a 'bareboat' charterer, or of some specified class of person like a compulsory pilot.
>
> • • •
>
> Grillea v. United States, 2 Cir., 232 F. 2d 919, merely held that a longshoreman might sue a ship in rem if he was injured by her unseaworthiness, . . ." 277 F. (2) at 267.

III. There Is Not Liability In Rem Where There Is Immunity From Liability In Personam.

Aside from much loose language in decisions, there is no case, English or American, which holds:

(a) That an inanimate object such as a ship "warrants" its seaworthiness or other fitness.

(b) That there is a separate and distinct liability of the inanimate object apart from that which may arise by reason of the acts, omissions, or contracts of persons lawfully in possession of the ship or otherwise related to her.

That has been plain for seventy-five years; certainly since this Court's decision in *Boyd v. United States*, 116 U. S. 616, at 637 (1886). Pertinent language from this decision is quoted *infra* (pp. 11 and 12).

What of the case, however, where the person lawfully in possession of a ship is not liable or, more properly, is endowed with a personal immunity? These situations are answered by a number of authoritative decisions, all of which point out the necessity of drawing the line of distinction between the liability of the ship for acts of the persons lawfully in possession of her, and liability of the ship *qua* ship. One exists, the other does not.

IV. Where There Is a Personal Defense, Created by Statute or Otherwise, Liability In Rem Has Been Denied.

A. The Ship Is in Custodia Legis.

In *New York Dock Co. v. S. S. Pozan*, 272 U. S. 117, the ship was *in custodia legis*. During the period of such custody, charges for wharfage had accrued. This Court approved ". . . the general rule that there can be no maritime lien for services furnished a vessel while in custodia legis", 274 U. S. 117 at 120. See discussion of this case, page 498, *The Law of Admiralty*, Gilmore and Black.

Although the Court in the *Pozan* case allowed the wharfage as part of the administration expense because of action by the Court in directing the ship to proceed to the wharf to unload, the effect of the decision is to deny a maritime lien arising while *in custodia legis*. That is plain from subsequent decisions such as *Vlavianos v. Cypress*, 171 F. 2d 435, cert. denied 337 U. S. 924, where it was held that even a lien for crew's wages could not arise during the time a ship was in the custody of the law. See also *Collie v. Fergusson*, 281 U. S. 52.

B. The Ship Is Owned by the Sovereign.

If there is separate *in rem* liability of a vessel, distinct and apart from that which makes the vessel security for the acts of those in charge of her, what of the question of *in rem* liability of the vessel of a sovereign? This question has been answered by both English and American courts.

In *The Tervaete*, (1922) P. 259, the English Privy Counsel said:

> "In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants . . .
>
> ". . . But for a lien to arise . . . some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision.
>
> ". . . Neither the Belgian Government could have been sued in personam, nor could their ship have been arrested in rem. If this is so, I do not understand how there could then be any maritime lien on the ship. To

hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property . . ."

In a later case the British courts held the same way with respect to a ship of the United States. See *The Sylvan Arrow*, (1923) P. 220.

In the year that the British Court reached its result in *The Terraete*, this Court reached the same result in *The Western Maid*, 257 U. S. 419 (1922). That case involved three original petitions for writs of prohibition and/or mandamus against district courts to prevent them from exercising jurisdiction of proceedings *in rem*. The cases involved liability for collisions which had occurred while the libeled vessels were owned by the United States or of which it had been owner *pro hac vice* and which had been, at the time of the issuance of process against them, sold or returned to their owners. Speaking for the Court, Justice Holmes said:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow."
>
> ". . . The United States has not consented to be sued for torts, and therefore, it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so . . . It may be said that the persons who actually did the act complained of may or might be sued, and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accom-

plish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force . . . The personality of a public vessel is merged in that of the sovereign . . ."

"But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp . . ."

C. The Provisions of a Statute Intervene.

In *Consumers Import Co., Inc. v. K. K. K. Z.*, 320 U. S. 249, goods being carried at sea had been damaged by fire. The ship's owner brought himself within the terms of the so-called fire statute, 46 U. S. C. A. 182, 186, and, therefore, by the terms of that statute was freed of liability *in personam*. This Court was squarely presented with the question of whether there could be a separate *in rem* liability of the ship where a statute of the United States operated to extinguish personal liability. The Court said:

"Claimant says this (exoneration of owner from in personam liability) means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them." 320 U. S. at 253, 254.

In deciding the *Consumers Import Co.* case, this Court pointed out that as early as 1886, the courts of this country had rejected the thesis that there could be a liability of property, separate and apart from personal responsibility. The case relied upon was *The Norwich (Place v. Norwich and New York Transp. Co.)*, 118 U. S. 468, where the Court said;

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a bound cargo or illegal trade; and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property. It is true that in *U. S. v. Mason*, 6 Biss. 350, it was held that in a proceeding *in rem* for a forfeiture of goods the owner might be compelled to testify, because the suit is not against him, but against the goods. That decision however, was disapproved by this court in the case of *Boyd v. U. S.*, 116 U. S. 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding (*in rem*) is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forefeiture, and it is his property which is sought to be forfeited. In the words

of a great judge: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." VAUGHAN, C. J. in *Sheppard v. Gosnold*, Vaugh. 159, 172; approved by PARKER, C. B., in *Mitchell v. Torup*, Parker, 227, 236."

V. The Fact That the Intervening Statute Is a Workmen's Compensation Act Does Not Change the Result.

There is uniformity of decision among all of the inferior federal courts upon this point. The first Court of Appeals decision was *Samuels v. Munson Line*, 63 F. 2d 861 (C. A. 5, 1933). That decision was followed in *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), cert. denied, 345 U. S. 908.

There have been a number of subsequent attempts to circumvent the exclusive liability provision of § 5 of the Longshoremen's and Harbor Workers' Compensation Act. In point of time the next was *Conzo v. Moore-McCormack Lines, Inc.*, 114 F. Supp. 956 (1953). Judge Leibell of the Southern District of New York followed the rule of the *Smith* case and denied a right of recovery beyond that provided in the Compensation Act. The next was *Bennett v. Mormacteal*, 160 F. Supp. 840, affirmed on the opinion of the district court, 254 F. 2d 138 (C. A. 2, 1958), cert. denied, 358 U. S. 817.

It was followed by the District Court for Puerto Rico in *Flores v. Prann*, 175 F. Supp. 140 (1959), construing the Puerto Rican Compensation Act.

A somewhat different tack was tried in *Ginnis v. Southerland*, 313 Pacific 2d 675 (Wash.). There the longshoreman employed by the shipowner sued, individually, the captain of the ship on which the longshoreman had been working when injured. The Supreme Court of the State of Washington, interpreting the Longshoremen's and Harbor Workers' Compensation Act, denied recovery. The interesting decision of the lower court in that case is reported only at 1956 AMC 2272.

There have been many situations where courts have had to consider whether there is actually a liability solely *in rem*, separate and apart from the liability of the person having control of the ship alleged to have been the offending instrumentality. In each the court would have been required to grant recovery if in fact this separate liability akin to "deodand" existed in fact. It was rejected in each case. The theory of a number of earlier decisions and the specific holding in several recent decisions support our position.

In the opinion in petitioner Reed's first admiralty suit *in personam* against Waterman Steamship Corp. [No. 339 of 1956 U. S. D. C. E. D. Pa.] 1958 AMC 658 [not officially reported] Judge Kirkpatrick said:

> "I think it can be taken that the decisions of the Court of Appeals for the Second Circuit in *Canella v. Lykes Bros. SS. Co.*, 174 F. 2d 794; *Grillea v. U. S.*, 229 F. 2d 687 and *Grillea v. U. S.*, 232 F. 2d 919, have established that it is the law that, in the case of a bareboat charter, there is no liability on the part of the owner if the condition arose after the vessel had passed out of his control into that of the demisee, and, as a corollary, that the burden is upon the libellant to show that the unseaworthy condition existed before the delivery of the vessel."

The correctness of that statement of the law has never been challenged by petitioner. In addition to *Canella* and *Grillea*, Judge Kirkpatrick could have cited a long list of cases to support the proposition. It is thus established that there is not and could not be liability of Waterman, *in personam*, for injury to this longshoreman caused by the breaking of a board in the pallet brought on board the ship during the unloading operation then going on, where the possession and control of the ship had passed out of Waterman under

the bare boat charterer some days before the allegedly defective pallet was brought on board ship. If, therefore, there is no *in personam* liability on the part of Waterman, the only *in personam* liability there could be in the case at bar is that of Pan-Atlantic, the employer of Reed, which had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. But by statute Congress had said that there may not be unlimited *in personam* liability on the part of Pan-Atlantic to Reed. This was part of the *quid pro quo* which supported the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act. See *New York Central R. Co. v. White*, 243 U. S. 188 and *Crowell v. Benson*, 253 U. S. 22.

Congress has created for the employer of longshoremen who complies with the requirements of the Compensation Act a personal defense, a situation not at all unique in our law.

Liability in Tort is that of the person lawfully in possession of the ship. That is Pan-Atlantic, and there is no separate liability *in rem*.

We believe we have demonstrated that Waterman's warranty of seaworthiness extended only to the condition of the vessel as of the time it surrendered possession and control of it to the owner *pro hac vice*.[4] For conditions arising thereafter, the owner out of possession would not be subject to *in personam* liability. In the usual case the owner *pro hac vice* would be so liable. That has been settled law at least since the decision in *The Barnstable*, 181 U. S. 464 (1901) if not earlier, *Leary v. United States*, 81 U. S. 607, 610 (1871).

> "In general, all *in personam* liabilities arising out of the ship's operation are brought home to the demise charterer."

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4. *Vitozi v. Balboa Shipping Co., Inc.*, 163 F. 2d 286 (C. A. 1, 1947); *Canella v. Lykes, Reed v. Waterman*, 1958 AMC 658.

> "It is the demisee who 'is the warrantor of seaworthiness' . . ." Gilmore and Black, *The Law of Admiralty*, 218.

Case law on the point is plain.

Vitozi v. Balboa Shipping Co., Inc., 163 F. 2d 286; *Muscelli v. Frederick Starr Construction Co.*, 296 N. Y. 330, 73 N. E. (2) 536, 1947 AMC 1110.

Even Judge Learned Hand [whose decision in *Grillea v. U. S.*, 232 F. 2d 919 is discussed *supra*] said that he ". . . would altogether agree that the owner-demisor is not liable for *any* unseaworthiness arising after the charter"[5] [emphasis ours].

Unless, therefore, the court is prepared to overturn well established precedent, it is clear that Waterman would not be liable *in personam* for so-called unseaworthiness consisting of a latent defect in a cargo tray or pallet on board YAKA incidental to a loading operation conducted after Pan-Atlantic had assumed possession and control and Waterman had surrendered those incidents of ownership.

Normally then it would be said that if anyone warranted "seaworthiness" of YAKA, or the cargo tray or pallet to Reed, a longshoreman working on board her, it would be Pan-Atlantic. But here Congress has intervened, unless this Court is prepared to say that the constitutional grant of "Admiralty and Maritime jurisdiction"[6] supervenes and displaces the power of Congress.

Another possibility exists. We think that to state it demonstrates its invalidity. It is, of course, possible that this court may say that an inanimate object [YAKA] extends a "warranty" where, by operation of law, a warranty by a person [individual or corporate] does not exist. But is not a warranty contract? Does not contract and/or warranty presuppose someone *sui juris* and capable of making a contract, express or implied, by representation or

5. *Canella v. Lykes Bros. SS. Co.*, 174 F. 2d 794 at 795.
6. Constitution, Art. III, Sec. 2.

voluntary and reasoned decision? Is the inanimate ship YAKA to be personified to this extent? We submit there is no warrant in authority or reason for such a holding.

We distinguish, as we submit must also this Court, between a forfeiture[7] and a warranty. Petitioner fails to distinguish the forefeiture cases, else he would not cite two of them, *The Little Charles*, Fed. Cas. 15,612 and the *Malek Adhel*, 48 U. S. 210, at page 6 of his petition. Both are forefeiture cases based upon specific statutory provisions.

> ". . . But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of a ship's personality, is always to be welcomed."[8]

It might even be said by those whose logic goes no deeper than the label that a ship should be held to "warrant" its own seaworthiness because, after all, a ship is a ship and admiralty and maritime law is "different". But can even such fallacious reasoning attribute to an inanimate object the ability to warrant that some human and supposedly superior being will not bring aboard the ship (inanimate and powerless to prevent it) a cargo tray which is defective?

It is interesting and important to note that those who contend for a separate liability *in rem* (apart from liability *in personam*), cite Holmes, *The Common Law*. Cf. Petition, pp. 5 and 6. They do not read completely nor, it is submitted, fully or with comprehension. It is true that language can be found in *The Common Law* which, taken out of full context, could be said to support the concept of liability of the *res*, separate from the liability *in per-*

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7. A true proceeding against the thing itself. Always the creature of statute [collision with an aid to navigation and transportation of illegal liquor by car are examples]. We are not unmindful of "deodand". If the offending thing is to be forfeited, then why the ship and not just the offending pallet?

8. Gilmore and Black, *The Law of Admiralty*, 510.

sonam of those lawfully in possession of her. However, such statements are diametrically opposed to the holding in the opinion written by Holmes in *The Western Maid*. When examined in full context, they are not even supported by *The Common Law*. See Holmes' discussion at pages 29 and 36, *The Common Law*.[9]

That certain of the language upon which opponents of our position must necessarily rely was not intended to be swallowed "in haec verbae" is quite apparent from Holmes' letter to Pollock, Volume 2, page 135. Holmes was referring to a criticism of his decision in *The Western Maid*, 37 Harvard Law Review, 529, when he said: ". . . he seemed to think I had forgotten *The China* (74 U. S. 53) about which I discoursed in *The Common Law* . . ."

For one who will take the time to examine recognized authority dispassionately and will bear in mind the rather acrid comment by Judge Wooley,[10] it becomes clear that while liability *in rem* is a "convenient conceptual tool for many purposes",[11] it is a "ghost elusive to the grasp". It is certainly not something substantial enough upon which to base a holding of liability which would accomplish that which Congress and the Courts [12] have said should not be accomplished.

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9. Page 29, ". . . to say, 'The ship has to pay for it' (F. N. 3 Black Book of Admiralty, 103) was only a dramatic way of saying that somebody's property was to be sold, and the proceeds applied to pay for a wrong committed by somebody else."

10. "Habit has so much overlaid our thought in many practice matters that their skeletal anatomy oftentimes becomes blurred in our minds." *The J. K. Welding Co. v. Gotham Marine Corporation*, 47 F. 2d 332 at 333.

11. *Smith v. The Mormacdale*, 198 F. 2d 849.

12. *Swanson v. Marra Brothers*, 328 U. S. 1; *Vitozi v. Balboa Shipping Company, Inc.*, 163 F. 2d 286 (C. A. 1, 1947); *Samuels v. Munson SS. Lines*, 63 F. 2d 861 (C. A. 5, 1933); *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1953), cert. den. 345 U. S. 908; *Bennett v. The Mormacteal*, 160 F. Supp. 840, 254 F. 2d 138 (C. A. 2, 1958); *Noel v. Isbrandtsen Co.*, 287 F. 2d 783 (C. A. 4, 1901); *Pichirilo v. Guzman*, 290 F. 2d 812 (C. A. 1, 1961), reversed on other grounds, 369 U. S. 698.

Reasoning by the application of labels does not, we respectfully suggest, require the application of modern *stare decisis* to the point where intellectual honesty must be sacrificed. Otherwise, a court would reach judicial decision based upon popular expediency because it believed it heard the cry "to the guillotine" echoing in the background.

VI. The Indemnity Provision in the Charter Contract Neither Justifies Nor Calls for a Different Result.

It is elementary that the indemnity provision in the contract between Waterman and Pan-Atlantic does not, simply because it is an indemnity contract, create rights in third parties. More than that, it is simply declarative of the common law. Ever since *The Barnstable*, 181 U. S. 464 (1901), it has been unquestioned law that one of the implied obligations of a charter which constitutes the demisee owner *pro hac vice* is that the obligation of the demisee is to return the ship free and clear of liens.

Pan-Atlantic has never, during the entire proceedings in this case, questioned its obligation under the general maritime law, as stated in this Court's decision in *The Barnstable*, 181 U. S. 464 (1901).[13] It must satisfy all liens against the YAKA at the time it redelivered the ship to its owner when Pan-Atlantic's ownership *pro hac vice* terminated. An examination of the docket entries in the case at bar [R. 1a] demonstrates clearly that this entire case is nothing less than a device to circumvent an Act of Congress [33 U. S. C. A. 901, 905]. The device employed is to use a label [in rem], but that label misrepresents the contents of the package. There was never any process under which the ship was attached and no stipulation for value. See this Court's comments upon the effect of such

13. See also the recent decision (October 29, 1962) in *Ferrigno v. Ocean Transport, Ltd. v. Pittston Stevedoring Corp.*, (C. A. 2) — F. (2d) —, reversing in part, 201 F. Supp. 173.

a stipulation in *Continental Grain Co. v. The Barge FBL-585*, 364 U. S. 19. It has been said:

> "The stipulation for value is a complete substitute res, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the res in the court's custody." *J. K. Welding Co. v. Gotham Maritime Corp.*, 47 F. 2d 332 at 335.

Without attachment of the ship or a stipulation for value filed, it is abundantly plain that what is really sought to be accomplished is not enforcement of liability *in rem* as such. The procedural device originally intended to enforce financial responsibility where jurisdiction over the person could not be obtained is here sought to be perverted. Petitioner seeks to impose liability upon Pan-Atlantic in a situation where Congress by frequent amendments to the Compensation Act, has reaffirmed the principle that the absolute liability of the employer shall be "exclusive and in place of all other liability of such employer to the employee". 33 U. S. C. A. 905.

CONCLUSION.

We submit that the Second Circuit no longer follows *Grillea v. United States*, 232 F. 2d 919; that there is not conflict among the circuits; and that the decision below is correct. In footnote 2 to its recent decision in *Guzman v. Pichirilo*, 369 U. S. 698, 82 S. Ct. 1095, reversing upon other grounds the First Circuit's decision reported 290 F. 2d 812, this Court noted that the First and the Third Circuits subscribe *in toto* to the principle that *in rem* liability does not exist without underlying liability *in personam*. This Court did not note the Fourth Circuit's decision in *Noel v. Isbrandtsen*, 287 F. 2d 783 (1961), cert. denied, 366 U. S. 975. That decision places the Fourth Circuit squarely on the same side of the line, for it specifically rejects the concept of liability *in rem* apart from liability *in personam*, 287 F. 2d at 785, et seq.

There is, therefore, no conflict and nothing about the holding below which warrants this Court examining the decision of the Court of Appeals.

Certiorari should, therefore, be denied.

Respectfully submitted,

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Corporation.

APPENDIX.

FELICE GRILLEA,

Petitioner,

v.

UNITED STATES AND NATIONAL SHIPPING AUTHORITY.

United States Court of Appeals, Second Circuit.

ROBERT KLONSKY, *for the Petitioner.*

JOSEPH M. CUNNINGHAM, THOMAS F. FEENEY, *in Opposition.*

Opinion on Petition for Rehearing.

PER CURIAM:

The libellant moves for a rehearing because of the concluding paragraph of our opinion, in which we said that we would not consider whether a maritime lien arose because of "unseaworthiness occurring after the demise." Our reason was that the libellant had not elected to sue "in rem," either in this libel or afterwards; and the present petition is directed to that issue alone, apparently upon the assumption that we held that such a lien did arise which the libellant could have invoked by a timely election. We fear that we may have misled the libellant into so assuming by the following language earlier in the opinion: "There remains the question whether the respondent is liable because of the unseaworthiness of the hatch cover placed where it was after the ship had been delivered upon a demise. That it would have been liable only if the ship

had been unfit when delivered to the demisee we held in *Cannella v. Lykes S. S. Co., supra,* 1949 A. M. C. 1094, 174 F. (2d) 794; and we adhere to that ruling, so that the issue depends upon whether the charter was a demise." This is not to be regarded as holding that any lien ever did arise, and we will allow the libellant to file a supplemental brief in support of the position that, although the ship was seaworthy, as to her hull, tackle, gear and stowage, she became unseaworthy, because after the demise the longshoremen placed the wrong hatch cover over the "padeye," and that a lien arose against her because of the misplacement.

If the libellant wishes to present such a brief, he must file and serve it on or before April 3rd, and if he does, the respondent may file an answer on or before April 9th.

IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Etc, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 183 F. Supp. 69 (E. D. Pa. 1960) (R. 58a). The opinion of the Court of Appeals for the Third Circuit is reported at 307 F. 2d 203 (R. 84). The opinion of the Court of Appeals for the Third Circuit on the Petition for Rehearing is reported at 307 F. 2d 203 (R. 101).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Is a vessel in the possession and control of a demise charterer liable in rem for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control of the vessel, and if the demise charterer is also the stevedore-employer?

STATEMENT OF FACTS.

Elijah Reed, the petitioner herein, is a longshoreman who was injured while employed by Pan-Atlantic Steamship Corporation and engaged in the loading of the Steamship "Yaka". The ship was and is owned by Waterman Steamship Corporation; however, at the time of Reed's injury the ship had been demised to and was being operated by Pan-Atlantic Steamship Corporation as bareboat charterer.

The accident occurred in the hold of the ship when a wooden pallet upon which Reed was standing broke. The pallet was part of a staging which had been supplied to the vessel by the stevedore for the performance of the maritime service in which the longshoremen were engaged.

Petitioner filed a Libel In Rem against the S/S "Yaka" alone. A trial limited to the issue of liability resulted in a finding that Reed's injuries had been caused by an unseaworthy condition created by Pan-Atlantic during the demise, 183 F. Supp. 69 (E. D. Pa. 1960). Although Reed was limited to the benefits of the Longshoremen's and Harborworkers' Compensation Act, so far as his employer, Pan-Atlantic was concerned, the court nonetheless concluded that the "Yaka" itself was accountable in rem for the injuries caused by its unseaworthiness. At the same time, Pan-Atlantic was held liable over to Waterman Steamship Corporation under the express terms of its indemnity agree-

ment. Both Waterman on behalf of the "Yaka" and Pan-Atlantic appealed.

The Court of Appeals for the Third Circuit reversed. While affirming the determination of unseaworthiness, the Court of Appeals below held that liability in rem could not possibly arise in the absence of an underlying in personam liability of someone having an interest in the vessel. From this premise the court reasoned that since neither the owner nor the employer was liable in personam to the injured employee there was no underlying obligation which would give rise to an in rem recovery against the vessel. It bottomed this analysis upon the fact that the unseaworthiness arose after the demise charter, and the Longshoremen's and Harbor Workers' Act prevented Reed from recovering against Pan-Atlantic. Asserting the case of *Smith v. Mormacdale,* 198 F. 2d 849 (3 Cir. 1952) as authority for its holding, the court reversed the determination of the District Court.

A petition for rehearing was denied with Chief Judge Biggs and Judge Staley dissenting. Judge Biggs stated that the decision was contrary to the reasoning of this court in *Plamals v. The Pinar Del Rio,* 277 U. S. 151 (1928) and *Seas Shipping Company v. Sieracki,* 328 U. S. 85 (1946) and opined further that the majority view which precluded an in rem obligation where there was no underlying in personam obligation was unwarranted. Judge Staley, the author of the Smith opinion upon which the majority relied, stated that that decision was inapplicable to a case where the shipowner was not the employer.

ARGUMENT.

I. The Decision of the Court Below Violates the Basic Maritime Principle That a Lien Attaches Against a Vessel in Case of Personal Injury and the Vessel Itself Is Held Accountable as the Responsible Personality Exclusive and Independent of Other Concurrently Responsible Parties.

In the United States we have never waivered from the long established doctrine that a maritime injury impresses upon the vessel a maritime lien for injuries received by a person lawfully on board the vessel. See *The John G. Stevens*, 170 U. S. 114; the *Anaces*, 93 F. 240 (4th Cir. 1899); 1 Benedict, Admiralty § 12, p. 23; Price, The Law of Maritime Liens, 140.

This Court has decided that this maritime lien which arises upon injury is the foundation of the proceeding *in rem*. To use the language of Mr. Justice Field, the *Rock Island Bridge*, 73 U. S. (6 Wall.) 213, 215 (1867):

> "The lien and the proceeding in rem are, therefore, correlative—where one exists, the other may be taken and not otherwise."

This rule has been attacked on only one occasion. In 1858 the 12th Admiralty Rule was amended so as to take away the right to proceed in rem against domestic vessels in cases in which there was a lien given for necessaries by a local statute. The amendment proceeded upon the assumption that the right to proceed in rem was a matter of procedure since the Act of 1842, 5 Stat. 516, empowering the Supreme Court to make admiralty rules apply only to matters of procedure. The Amendment of 1858 remained in effect until 1872 when the Rule was changed to permit suits in rem against the ship or against the master alone in personam. The issue was presented to this Court in the *Lottawanna*, 21 U. S. 582 (1875), which involved an

action in rem for supplies furnished in the home port of the vessel for which there was no lien given by local statute. If the right to proceed in rem were merely a matter of procedure which could be validly regulated by the Supreme Court under its rule-making power, then it would seem from the wording of the 12th Admiralty Rule as amended in 1872, that there was a right to proceed in rem regardless of state statutes giving liens. But, the court held that the right to proceed in rem was not a matter of procedure, but a "right of property" and that the effect of the change of 1872 was simply "to remove all obstructions and embarrassments in the way of instituting proceedings in rem".

Since that decision there has been no doubt in our jurisprudence that the maritime lien is the foundation of the proceedings in rem in the admiralty and that there is no right to bring on in rem action unless there is a lien. The *Resolute*, 168 U. S. 437 (1897); the *Rock Island Bridge, supra.*

The majority view of the court below that the in rem proceeding is merely a procedural device and that no in rem obligation can come into being unless there is an underlying in personam obligation is in conflict with well-established principles.

The course of litigation has brought before the courts a great variety of situations in which the issue for decision was whether in rem accidents would lie for claims against the vessel where the owner of the ship was not personally liable. While the doctrine that the ship is not liable unless the owner or his servants are responsible has been consistently adhered to by the English courts, the American rule is that personal liability of the owner is not essential to the existence of the lien. Price, The Law of Maritime Liens, p. 5. In the *Malek Adhel*, 43 U. S. (2 How.) 210 (1844) it was contended that the innocence of the owner of a vessel precluded the confiscation of the ship. Mr. Justice Story in denying this contention stated:

> "It is not an uncommon course in the admiralty, acting under the law of nations to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof."

The independent liability of a ship has been established against various factual backdrops. Thus, a good-faith purchaser of a vessel may have his ship arrested and sold even though he is subject to no in personam liability since the maritime lien adheres to the property. See *The Bold Buccleugh*, 7 Moore P. C. 267 (1861); 1 Benedict, Admiralty, p. 25. A vessel under a bareboat charter is liable in rem to an injured party, despite the lack of control on the part of the owner. *The Barnstable*, 181 U. S. 464 (1901); *United States v. The Helen*, 164 F. 2d 111 (2 Cir. 1947); *Davis v. M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md. 1951). Ships have been forfeited for statutory violations even though there has been no privity or knowledge on the part of the owner. *The Little Charles*, 26 Fed. Cases 979, Case No. 15,612 (C. C. D. Va. 1819); *The Malek Adhel*, 43 U. S. (2 How. 210 (1844)).

Mr. Justice Holmes, in The Common Law, drew from the case of *The Ticonderogo* (Swabey 215, 217) to illustrate the liability of a vessel in rem under charter for collision damages even though the vessel owner could not be held liable for said damage and from *The China*, 74 U. S. (7 Wall.) 53 (1869), wherein this Court held the vessel liable for collision damage even though she was under the control not of her owner, but of a pilot whose employment was compulsory under the laws of the port. See further *Logue Stevedoring Co. v. Dalzellance*, 198 F. 2d 369 (2 Cir. 1952).

By way of further illustration, Chief Justice Marshall in *The Little Charles*, 26 Fed. Cases 979, 982, quoted with approval by Mr. Justice Story in *The Malek Adhel*, 43 U. S. (2 How.) 210 (1844), stated:

> "This is not a proceeding against the owner, it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the Master. The vessel acts and speaks by the Master. She reports herself by the Master. It is, therefore, not unreasonable that the vessel should be affected by this report. . . . The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing."

See also *The Barnstable*, 181 U. S. 464 (1901).

Likewise a vessel must respond in rem for damage caused during a demise charter. When this question first came before this Court, it was an accepted fact that *in rem* liability existed and the only issue indicated was whether the owner or demisee bore the ultimate responsibility under the charter party. *The Barnstable*, 181 U. S. 464 (1901). See also *Logue Stevedoring Co. v. Dalzellance*, 198 F. 2d 369 (2 Cir. 1952); *Davis v. M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md. 1951); *United States v. The Helen*, 164 F. 2d 111 (2 Cir. 1947).

In the recent case of *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423, this court gave further indication of its recognition of these principles when it stated:

> "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133."

Further, even though a shipowner may not be liable in personam where the vessel is demised by a bareboat charter and the unseaworthiness arises after the demise, the vessel itself is liable. Thus in *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794 (2 Cir. 1949), cert. den. 338 U. S. 859, it was stated at page 796:

> "If the demisee becomes liable for breach of warranty of unseaworthiness, a maritime lien arises upon the ship securing the obligee. Regardless of whether such lien arises when the demisee becomes liable for other default, we cannot doubt that one does arise when, as here, the liability is imposed in lieu of a warranty of seaworthiness, and upon the theory that, even where there is such a warranty, the resulting liability sounds in tort. Since the lien extends to unseaworthiness supervening after delivery, as well as that already existing, the owner demisor, so far as his ship will answer, is initially subject to a larger liability than is subject to under the putative imposed liability, although in cases of supervening unseaworthiness the eventual loss would no doubt fall on the demisee."

In *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956) a longshoreman, injured aboard a vessel owned by the United States, but demised to his employer under a bareboat charter agreement, filed a libel in rem against the vessel. The unseaworthiness arose after the demise and, therefore, Judge Hand ruled that an in personam action could not lie against the owner of the vessel. Despite this lack of an underlying in personam liability, Judge Hand ruled that a maritime lien could be imposed upon the vessel. He stated that the claim based upon a maritime lien was upon a different cause of action from that which arose in personam. Thus, in a factual situation precisely the same as that at bar, the Second Circuit, speaking through Judge Learned Hand, could see no reason why the vessel could not be subjected to in rem liability in a situation where there was

no underlying in personam liability. See also *Leotta v. The Esparta*, 188 F. Supp. 168 (S. D. N. Y. 1960).

The cases of *Latus v. United States*, 277 F. 2d 264 (2 Cir. 1960), and *Noel v. Isbrandtsen*, 287 F. 2d 783, by contrast further illustrate this point. Both cases involved vessels which were out of navigation. Accordingly, no warranty of seaworthiness could possibly arise. See *West v. U. S.*, 361 U. S. 118 (1959). Therefore, in both cases it was held that there could be no possible recovery in view of the fact that there was no duty breached. In *Latus*, Judge Hand stated that "a longshoreman might sue a ship in rem if he was injured by her unseaworthiness which no one denied." And in *Noel*, Chief Judge Sobeloff stated:

> ". . . It is one thing to hold that a conviction or liability in personam is not a condition precedent to the action in rem; it would be quite another to say that the vessel may be held accountable as an entity where there has been no violation of the warranty of seaworthiness or a breach of duty on the part of anyone."

Norris, in his Law of Seamen, summarizes the ruling case law as follows:

> ". . . The maritime lien gives the lienor a right of action against the vessel herself and ignores the owner personally. The ship is personalized. . . . A lien is given . . . and made on the strength of the vessel as security. *Thus the vessel can be held liable on a lien even though the owner may not be personally liable*, as a debt incurred on the credit of the ship by a charterer under a demise charter. The maritime lien, . . . has been created by law for the purpose of furnishing wings and legs to the vessel . . ." 1 Norris, Law of Seamen (1951), p. 462. (Emphasis supplied.)

The foundation of the rule that injury impresses upon the wrongdoing vessel a maritime lien and gives to the party injured a property right in the offending ship is the prin-

ciple of the maritime law that the ship, by whomsoever owned, or navigated is considered as herself the wrongdoer, liable for the tort and subject to a maritime lien for damages. *The John G. Stevens,* 170 U. S. 114.

The Bold Buccleugh, supra, was the first enunciation of the principle that all maritime liens, from whatever source arising, are to be treated as a property interest in the vessel. That decision has been approved by this court. See *The John G. Stevens, supra.* American maritime law has traditionally recognized the vessel for these purposes as a personality and independent of its owners and operators. It is so completely a separate and distinct juridical entity that it is sued, held liable and financially answerable for its trespasses. This principle is explained through the historical development of the maritime law in America. In this regard, Benedict states:

> "The doctrine of the personality of the ship may be described as a fiction, but the fiction is rather in the mode of expression, than in the substance of the law. The principle is that one . . . who through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship. (Citing Kruass Bros. Lumber Co. v. The Pacific Cedar, 290 U. S. 117, 78 L. ed. 216; 54 Sup. Ct. 105) . . . The ship is so much an independent enterprise, a juridical aggregate of rights and liabilities that her creditors virtually go shares in her; . . . A maritime lien is the necessary basis for every admiralty proceeding in rem. Such a lien is a right of property and not a mere matter of procedure:" 1 Benedict on Admiralty, pp, 17-18.

> "Maritime liens differ from common law liens in a very important point. A common law lien is always connected with a possession of the thing: it is simply a right to retain. On the other hand, a maritime lien

does not in any manner depend upon possession. It is a right affecting the thing, and giving a sort of proprietary interest in it, and a right to proceed against it, to recover that interest." 1 Benedict on Admiralty, p. 24.

Perhaps the clearest exposition of the independent personality and liability of a vessel is found in the historical review by Mr. Justice Holmes in The Common Law, pages 25 to 32, wherein it is stated:

> "A ship is the most living of inanimate things. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the Maritime Law can be made intelligible, and on that supposition they at once become consistent and logical." pp. 26-27.

This Court, speaking through Mr. Justice Reed, stated:

> ". . . Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court . . ." *Canadian Aviator Ltd. v. U. S.*, 324 U. S. 215, 224, 89 L. Ed. 901, 908 (1945). See also, *Atlantic Steamer Supply Co. v. The SS Tradewind*, 153 F. Supp. 354, 357 (D. Md. 1957).

In summary, there is no doubt that, under the American maritime law, a lien attaches against the vessel in cases of personal injury and the vessel as an independent entity is considered the personality accountable for the damages, without regard to the liability of the owner or any other personality.[1] The in rem liability is not dependent upon, or related to concepts of in personam liability.

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1. *The Palmyra*, 25 U. S. (12 Wheat.) 1, 6 L. Ed. 531 (1827); *U. S. v. Malek Adhel*, 43 U. S. (2 How.) 210, 11 L. Ed. 239 (1844); *The China*, 74 U. S. (7 Wall.) 53, 19 L. Ed. 67 (1869); *The John G. Stevens*, 170 U. S. 113, 42 L. Ed. 969 (1898); *The Barnstable*,

The court below, in ruling that no in rem obligation could come into existence absent a pre-existent in personam obligation, completely ignored the personification theory of liens which lies at the foundation of our maritime law. *Price, Law of Maritime Liens*, 118, 115 (1940).

The sole basis for destroying the petitioner's maritime lien in the case at bar was the fact that the charterer was also the stevedore-employer, whose exclusive liability to its employees was circumscribed by the Longshoremen's and Harbor Workers' Compensation Act. In concluding that there was no in rem liability without a correlative in personam liability, the majority below relied upon the case of *Smith v. The Mormacdale*, 198 F. 2d 849 (3 Cir. 1952), and ignored the dictates of this Court in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928), and *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946).

In the *Pinar del Rio* case this Court laid down the rule that a maritime lien must precede any *in rem* liability of a vessel. There, the plaintiff, a seaman, sued the vessel in rem under the Jones Act, 46 U. S. C. A. 688. This Court held that since the Jones Act did not expressly create a lien against the vessel, none could be inferred and, therefore, no action in rem could exist under that legislation. The Court ruled, however, that the seaman did have two avenues of approach: an action *in personam* against the employer under the maritime law as modified by the Jones Act, or his existing action *in rem* against the vessel under the general maritime law which provided the necessary lien which remained unaffected by the Jones Act.

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181 U. S. 464 (1901); *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 760 (1903); *Canadian Aviator, Ltd. v. U. S.*, 324 U. S. 215, 89 L. Ed. 901 (1945); *Cannella v. Lykes Bros. Steamship Co.*, 174 F. 2d 794 (2d Cir. 1949); *Carbon Black Export, Inc. v. S. S. Monrosa*, 254 F. 2d 297 (5th Cir. 1958); *Crumady v. J. H. Fisser*, 358 U. S. 423, 3 L. Ed. 2d 413; 1 *Benedict on Admiralty*, 17 et seq.; *Gilmore and Black, The Law of Admiralty*, Chap. IX (3), p. 494; 1 Norris, *Law of Seamen* (1951), p. 462; *Robinson on Admiralty* (1939), pp. 364, 612.

The Longshoremen's Act similarly created an *in personam* liability for compensation against the employer without creating any right of lien against the vessel. Just as the Jones Act, it left unchanged any already established lien rights. It gave the longshoremen new statutory rights against his employer *in personam* and gave the latter a defense against damage actions *in personam*. Thus, the rights of the longshoremen, except as limited by statute, remain unaffected either "by construction, analogy or inference" (cf. *The Pinar del Rio*, U. S. at 156, L. Ed. at 829). Accordingly, the longshoreman, as the seaman, may invoke his remedy against the ship under the general maritime law or they may make claim against their employers under the Compensation Act. Thus, as the Jones Act, which applied to the employer-employee relationship, has no effect upon the seaman's right *in rem* against the vessel, neither does the Longshoremen's Act affect the longshoreman's right in that regard. The *Pinar del Rio* treated the vessel as a separate and distinct legal entity.

Subsequently, in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), the Supreme Court reconfirmed the continuation of these rights. The Court said at 102:

> "We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer . . . But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against their persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone."

The Supreme Court in *Sieracki* limited the effect of the Longshoremen's and Harbor Workers' Act to the employer alone. In recognizing the continued existence of all prior

rights other than against the employer, this Court cited with approval *The Pacific Pine*, 31 F. 2d 152, 155 (W. D. Wash. 1929) which held that the ship is a third person against whom the longshoreman may bring his libel in rem.

It was the recognition of this line of authority by Chief Judge Biggs which caused him to state:

> "The majority view that no *in rem* obligation came into existence because there was no subsisting *in personam* obligation is untenable. The majority view seems to be contrary to the reasoning of the Supreme Court in Plamals v. The Pinar Del Rio, 277 U. S. 151 (1926), and Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946). A bare-boat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable absolute duty to maintain the vessel in a seaworthy condition. A charterer under circumstances such as those at bar does not gain immunity because of the Longshoremen's and Harbor Workers' Compensation Act. I think the case is wrongly decided for it takes away from the longshoreman the very important protective warranty of seaworthiness and limits Sieracki greatly."

II. Where a Longshoreman Employee of the Bareboat Charterer Is Injured as a Result of the Unseaworthiness of the Vessel the Charterer Having Contracted to Indemnify the Vessel Owner for Any Liens or Claims Arising While the Vessel Is Under Charter the Vessel Is Liable in Rem Independently of the Charterer's Liability Under the Compensation Act.

The majority below places its prime reliance upon its prior decision in *Smith v. "The Mormacdale"*, 198 F. 2d 849 (3 Cir. 1952). A review of the relevant authorities makes it quite clear that the Court of Appeals was incorrect in its decision in *Smith v. "The Mormacdale"* for

it failed to give cognizance to the American Law of liens and the personification theory upon which that law is based. In the case at bar the Third Circuit compounded their error and extended the *Smith* concept beyond that which was originally intended. An analysis of the *Smith* opinion indicates, as Judge Staley stated, its total inapplicability to the factual situation at hand. The Court in *Smith* decided a case where the vessel was the property of the employer and held that in such action the suit against the vessel was really against the employer who was protected from liability by the Longshoremen's Act. The Court there made it abundantly clear that only where the shipowner was the employer did the statute lend its protective cloak.

That this is the true analysis of the *Smith* case is necessarily buttressed by Judge Staley's dissent from the denial of rehearing in the case at bar. Judge Staley, the author of the opinion in *Smith*, dissented in this case because he felt the concept set forth in *Smith* should not apply to a case where the employer was not also the shipowner.

In the instant case, the majority below has applied *Smith* to a situation where the employer is not the shipowner, but a bareboat charterer. It felt that the distinction was not significant in view of the fact that demisee acquired control of the vessel. However, the demisee does not acquire ownership of the vessel. The owner retains his title and his pecuniary interest in the vessel and its operation. See *Guzman v. Pichirilo*, 369 U. S. 895 (1962). He continues to have the obligation that the vessel be seaworthy as this obligation remains non-delegable, continuing, and the shipowner is not relieved thereof by giving up control of the vessel. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

The mechanism of a lease of the vessel does not destroy the interest of the owner nor his concomitant nondelegable obligations. The owner's interest remains and

so does the longshoreman's right of lien against the vessel of which the owner holds title. The distinction between a charterer-employer and an owner-employer is both significant and substantial. The charterer may take the owner's control, but not his ownership and related obligations. Ownership *pro hac vice* does not involve passage of title nor does it require the vessel to be returned to the rightful owner free of lien. Significantly, the demise does not make the longshoreman the employee of the owner.

Nor is it material that the employer may ultimately have to pay. Ultimate payment in this case arises out of a contract of indemnity between the shipowner and the charterer-employer. As the liability over is traceable to the contract, Pan-Atlantic cannot realistically argue that this in rem action against the vessel is an action against itself. It cannot raise the exclusive protection of the Compensation Act to offset its contracted-for liability which it has voluntarily and clearly assumed. While the defense of a Compensation Act is a personal defense of Pan-Atlantic, it must be remembered that Pan-Atlantic is not being sued, its vessel is not liable for the damages, and its reimbursement to the vessel for unseaworthiness which may have arisen during the demise is immaterial to the case at hand. See *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, 350 U. S. 124 (1956). It was there contended that since the employer's obligation was exclusive under the Compensation Act, the employer could not be bound to pay ultimately. Mr. Justice Burton concluded that the exclusive liability provision of the Compensation Act did not protect the employer against claims based on contractual rights of indemnification. See also *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (3 Cir. 1953).

Yet, several of the Justices of this Court were reluctant to concur in *Ryan* for fear that the placing of ultimate responsibility on the stevedore on the basis of breach of warranty of workmanlike performance would vitiate the

underlying basis for the unseaworthiness doctrine as expressed in *Sieracki*. When the protective scope of the unseaworthiness doctrine was broadened to include longshoremen, this Court observed:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workman within the scope of its policy." *Sea Shipping Co. v. Sieracki*, supra, 328 U. S. 85 at page 100.

If the doctrine of *Sieracki* is to remain viable, this court must correct the ruling of the Court of Appeals for the Third Circuit.

CONCLUSION.

The decision of the court below permits the owner to insulate himself by a charter, and the charterer to protect himself by pleading immunity under the Longshoremen's and Harbor Workers' Act. This deprivation of the protective warranty of seaworthiness conflicts with the principles enunciated by this court in *Sieracki* and the *Pinar Del Rio* cases. It conflicts with the decision of Judge Learned Hand in *Grillea*. It permits the shipowner to deny his continuing and nondelegable duty by a simple device that has been common and is becoming more prevalent. The application of the decision of the court below makes it unnecessary for a longshoreman to be presented with a safe and seaworthy vessel for the combination of the Longshoremen's and Harbor Workers' Act and the bareboat charter results in

the insulation of all parties from liability. It brings into sharp focus the error of the Court not only in this case but in *Smith v. Mormacdale*. It fails to give recognition to the doctrine that under our theory of liens a vessel is an independent personality separate and apart from her owner.

The present decision is such a sharp departure from historically recognized principles of maritime law and so contrary to the characteristic features and humanitarian policies thereof, that it should not be permitted to stand. It is based on the erroneous view that in rem liability may not be imposed without an underlying in personam liability. It literally uproots and overturns our personification theory of liens and destroys the property rights of injured maritime workers in the vessels.

WHEREFORE, your petitioners respectfully pray that the judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT PAN-ATLANTIC STEAMSHIP CORPORATION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT PAN-ATLANTIC STEAMSHIP CORPORATION.

COUNTER-STATEMENT OF QUESTION INVOLVED.

May a longshoreman, injured in the course of his employment, recover damages in an admiralty action *in rem* against the ship where his employer is owner *pro hac vice* of the vessel and has complied with its obligations under the Longshoremen's and Harbor Workers' Compensation Act?

COUNTER-STATEMENT OF THE CASE.

The petitioner, Reed, was a longshoreman employed by the respondent, Pan-Atlantic Steamship Corporation. Pan-Atlantic was the owner *pro hac vice* of the SS YAKA, having chartered it under a demise or bareboat charter from the owner, Waterman Steamship Corporation.

Pan-Atlantic maintains its own stevedoring division and in certain ports its own employees load and unload vessels of which it is owner and also vessels which it is operating as owner *pro hac vice*.

While so employed by Pan-Atlantic the petitioner, Reed, was injured. A cargo tray or pallet had been used to bring cargo aboard the ship during the unloading operation. While the cargo tray was being temporarily used to form a staging upon which incoming cargo was landed, a board of the cargo tray broke when Reed stepped upon it. This caused the injury for which this suit was brought.

Reed's first action was a suit in admiralty *in personam* against Waterman Steamship Corporation, the owner of the YAKA. Upon a preliminary motion seeking dismissal on exceptions to the libel the district court indicated that unless Reed could show that unseaworthiness of the ship which had caused injury existed prior to the time the vessel was demised to Pan-Atlantic, Reed could not recover in that suit against Waterman. On the same day that decision was handed down Reed instituted the present action *in rem* against the YAKA. Waterman claimed the vessel and joined Pan-Atlantic as an Additional Respondent.

Reed's *in personam* suit against Waterman has since been dismissed on the merits and no appeal was taken from that judgment.

On the trial of the present action the district court found in favor of Reed. It based its decision on a finding of unseaworthiness by reason of the latent defect in the cargo tray. Although a finding of negligence was requested by the petitioner, the district court refused to find negligence on the part of either Waterman, the owner, or Pan-Atlantic, Reed's employer.

SUMMARY OF ARGUMENT.

Congressional intent to regulate and restrict the employer-employee relationship is clear. It was unquestioned for thirty years. During that period numerous attempts to breach the line which Congress had drawn were rejected by judicial decisions. The Compensation Act has been frequently amended. If the prior judicial decisions have not been in keeping with the intent of Congress, there has been ample opportunity for Congress to correct it. The fact that Congress has never even attempted to bring about the exception for which petitioner argues is substantial evidence that Congress agreed with the judicial decisions limiting the liability of the employer to those liabilities which Congress imposed.

There is no distinction, valid for the purposes of this case, between an owner of a ship and an owner *pro hac vice* of a ship. The owner out of possession and control of the ship is not legally responsible, upon principles of tort or warranty, for that which occurs after the owner has surrendered the vessel to the demisee. Congress might have altered the pattern if the results were not consonant with Congressional policy. There are other statutes and other rules of law which have been construed by this Court to forbid recovery by the device of an action *in rem* where statute or rule of law has precluded or abolished liability *in personam*. The present case is only one more instance of a statutory intent to restrict the imposition of liability against an employer-shipowner [*pro hac vice*] under the particular circumstances of this case.

Other limitations upon liability have been recognized where they involved damage to cargo by fire, where sovereign immunity has been inconsistent with the concept of a separate liability of the inanimate ship. Where claims *in personam* have been outlawed by the application of the statute of limitations, the courts have refused to permit

the device of liability *in rem* to serve as a substitute to achieve a different result. This rule of law is not to be cast aside because the statutory restriction upon liability is part of a statutory workmen's compensation scheme.

The concept that there might be a liability solely *in rem* where liability *in personam* has been abolished or does not exist had its origin in forfeiture statutes. No one disputes Congressional power to declare a forfeiture, granted due process. But forfeiture statutes are not based upon maritime liens and do not truly support the concept of liability solely *in rem*.

There is fundamental inconsistency in imposing liability solely *in rem* [without underlying personal liability] upon the basis of warranty. The concept of warranty by an inanimate object is fundamentally illogical.

With one exception, all of the lower courts which have dealt with the problem of liability solely *in rem* have decided it in the same way as the court of appeals decided the case at bar. The arguments advanced by petitioner for reversal will not stand careful analysis.

ARGUMENT.

When Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, it inserted the following provision:

> "The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury . . ." 33 U. S. C. A. 905.

The record in this case is clear. The petitioner, Reed, was in the employ of Pan-Atlantic. Pan-Atlantic was the owner *pro hac vice* of the SS YAKA at the time of Reed's injury. The owner, Waterman, had completely and exclusively relinquished "possession, command and navigation" to the demisee, Pan-Atlantic. *Guzman v. Pichirilo*, 369 U. S. 698 at 699. The cause of Reed's injury was a defective piece of equipment owned by Pan-Atlantic and brought on board the vessel shortly before the accident. If this constituted unseaworthiness, it was not unseaworthiness which pre-existed the demise of the vessel to Reed's employer, Pan-Atlantic.

Reed's first suit was against the owner, Waterman Steamship Corporation. That was an *in personam* action. In that action, Waterman filed peremptory exception to the libel and raised the question of its non-liability as owner for unseaworthiness arising after the demise and while the vessel was in the exclusive custody and control of an owner *pro hac vice* under a bareboat charter. In a decision not officially reported[1] Judge Kirkpatrick filed an opinion indicating there could be no liability on the part of the owner for unseaworthiness arising after the demise. He did not dismiss the libel because of the fact question as to when the unseaworthiness had arisen. On the same

1. Reported only at 1958 AMC 658.

day that decision was handed down, the present libel was filed against the ship *in rem*.

Reed's suit against Waterman has since been dismissed after hearing and, no appeal having been taken, that Judgment is now final.

In the thirty-seven years since Congress enacted the Longshoremen's and Harbor Workers' Compensation Act and provided that the remedies thereunder should be exclusive as between employer and employee, there have been a number of attempts to circumvent the intent of Congress. Until 1956 the decisions among the lower federal courts had been unanimous. Attempts to circumvent the statutory provision were uniformly rejected. *Samuels v. Munson Line*, (1933) 63 F. 2d 861 (C. A. 5); *Smith v. The Mormacdale*, (1952) 198 F. 2d 849 (C. A. 3); *Conzo v. Moore-McCormack Lines, Inc.*, (S. D. N. Y.) 114 F. Supp. 956 (1953); *Bennett v. Mormacteal*, (E. D. N. Y.) 160 F. Supp. 840 (1957); affirmed on the opinion of the district court, 254 F. 2d 138 (1958); cert. denied, 358 U. S. 817.

There was a similar result when the similar provision of the Compensation Act for Puerto Rico was tested in the same manner. *Flores v. Prann*, (1959) 175 F. Supp. 140. A different method of attack was attempted in *Ginnis v. Southerland*, 315 Pacific 2d 675 (Wash.).[2] That was an attempt to circumvent § 5 of the Longshoremen's Act by suing the ship's captain individually. The attempt was rejected.

The present case proceeds upon the premise that when Congress made the Compensation Act remedy exclusive as to any attempt to "recover damages from such employer at law or in admiralty on account of such injury", it did not really mean what it said. Rather, petitioner argues, the statutory language contained an implied exception where a suit in admiralty was brought *in rem* against

2. The decision of the lower court is reported only at 1956 AMC 2272.

the vessel of which the employer was only owner *pro hac vice* and not owner. There are a number of reasons why this Court should not approve this attempt.

A. Liability in Tort Is that of the Person Lawfully in Possession of the Ship. Where That Person Is Endowed With a Personal Defense Created by Statute, There Is No Distinct and Separate Liability In Rem.

> "The most important consequences of the distinction between the demise and the other forms of charters grow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice*."[3]

Whether we call him bareboat charterer, owner *pro has vice*, or demisee, it is he who "is the warrantor of seaworthiness".[4] Case law on the point is uniform and clear. *Vitozi v. Balboa Shipping Co., Inc.*, 163 F. 2d 286; *Muscelli v. Frederick Starr Construction Co.*, 296 N. Y. 330, 72 N. E. 2d 536. As this Court has put it more recently, "a charterer who has control of the operations is owner *pro hac vice*".[5]

It is, then, clear and settled law that the owner out of possession, Waterman, would not be liable for the so-called unseaworthiness which consisted of a latent defect in a cargo tray or pallet which was brought on board the ship during the course of the loading operation after Pan-Atlantic had become owner *pro hac vice* by assuming possession and control and Waterman had surrendered those incidents of ownership.

This Court has frequently asserted that "without doubt Congress has power to alter, amend or revise the maritime

3. Gilmore and Black, "The Law of Admiralty" page 218, citing *Leary v. United States*, 81 U. S. 607, 610 (1872); *Reed v. U. S.*, 78 U. S. 591, 601 (1871).

4. Ibid.

5. *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 737, overruled on another point; *Cosmopolitan Shipping Co., Inc. v. McAllister*, 337 U. S. 783.

law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employer's Law or general provisions for compensating injured employees; . . .".[6] In the case at bar Congress has intervened. It has provided that the liability of Pan-Atlantic, which, in the ordinary case, would be said to have warranted the "seaworthiness" of YAKA and of the cargo tray, is limited to those benefits Congress has provided in the Compensation Statute. No matter what Pan-Atlantic's liability might be in the absence of statute, it is respectfully suggested that judicial modification of the Congressional scheme is inappropriate. Congress clearly had the power to so modify maritime law to provide its own particular remedy where the employment relationship existed. There are numerous similar instances of limitations and modifications of liability both by statute and by interpretation of the general maritime law.

Probably the best known statutory modification is the so-called Fire Statute, 46 U. S. C. A. 182, 186. This Court had an almost identical problem with respect to that statute in the case of *Consumers Import Co., Inc. v. K. K. K. Z.*, 320 U. S. 249. In that case, goods which had been carried by sea were damaged by fire. The shipowner brought himself within the terms of the Fire Statute and by its terms he was free of liability *in personam*. The cargo owner brought an action *in rem* and this Court was squarely presented with the question of whether there could be a separate *in rem* liability of the vessel where a statute of the United States operated to extinguish the personal liability. There this Court said:

> "Claimant says this (exoneration of owner from in personam liability) means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execu-

6. *State of Washington v. Dawson*, 264 U. S. 219, 227; recently quoted with approval by this Court in *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 120.

tion against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them." 320 U. S. at 253, 254.

In deciding the *Consumers Import Co.* case, this Court pointed out that as early as 1886, the courts of this country had rejected the thesis that there could be a liability of property, separate and apart from personal responsibility. The case relied upon was *The Norwich (Place v. Norwich and New York Transp. Co.)*, 118 U. S. 468, where the Court said:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a bound cargo or illegal trade; and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his

property. It is true that in *U. S. v. Mason*, 6 Biss. 350, it was held that in a proceeding *in rem* for a forfeiture of goods the owner might be compelled to testify, because the suit is not against him, but against the goods. That decision however, was disapproved by this court in the case of *Boyd v. U. S.*, 116 U. S. 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding (*in rem*) is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great judge: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." ' VAUGHAN, C. J., in *Sheppard v. Gosnold*, Vaugh. 159, 172; approved by PARKER, C. B., in *Mitchell v. Torup*, Parker, 227, 236."

B. Where the Owner Is Not Liable in Personam and the Liability of the Owner Pro Hac Vice Has Been Validly Limited by Statute and That Limited Liability Has Been Satisfied, There Is No Separate Liability of the Ship In Rem.

The theory of the personification of a vessel is a convenient shorthand method of expressing legal results, but the theory is not a satisfactory basis for imposing a liability, particularly where Congress has created a personal defense. The personification theory has been used by many Courts as an expression of results reached, but the fact that it was a fiction has always been recognized where that became important, and the fiction has been discarded in many instances. It was discarded in the landmark case of the *Tug Eugene F. Moran*, 212 U. S. 466 (1909). The question was whether a car float which was in charge of a tug was answerable for the proportionate share of the damage resulting from the collision into which the tug

had brought the float. The personification theory was rejected in an opinion by Mr. Justice Holmes writing for a unanimous Court:

> ". . . No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. . . . Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. . . . But after all a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be eye ended. . . ."

If there was in fact a liability of the vessel *in rem*, separate and apart from the liability of the owner *pro hac vice*, then this Court's decision in *The Western Maid*, 257 U. S. 419 (1922) was not properly decided. There the United States sold some vessels of which it had been owner and returned to the original owners some vessels of which it had been owner *pro hac vice*. All had been involved in collisions or incurred similar casualty while being operated by the government. The suits were *in rem* against the vessels. Holmes, again writing for the Court, said:

> "It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person, but that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force . . . The personality of a public vessel is merged in that of the sovereign . . ."

> "But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp . . ."

Much of American maritime law and maritime tradition has its roots in the law of England. In the same year that this Court decided *The Western Maid*, the English Privy Council reached the same result with respect to a vessel of the United States. [See *The Sylvan Arrow*, (1923) P. 220] and wrote the celebrated opinion in *The Terrace*, (1922) P. 259, where the Privy Council said:

> "In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants . . .
>
> ". . . But for a lien to arise . . . some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision.
>
> ". . . Neither the Belgian Government could have been sued in personam, nor could their ship have been arrested in rem. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property . . ."

This Court has refused to permit the condemnation of the ship *in rem* where neither the owner nor the person in possession and control of it was personally liable by reason

of a limitation upon the time for filing suit contained in the bill of lading. This Court held that when the time limit ran so as to prevent suit *in personam*, an action *in rem* after the time could not be maintained, saying:

> "The '*claim*' is in either case against the company, though the *suit* may be against its property." *The Queen of the Pacific*, 184 U. S. 49, 53 (1901).

Another instance where the personification theory, literally applied, would bring about a different result is in the tug and tow situation. A provision frequently inserted in such contracts is that the tow agrees to assume all risks and to exempt the towing company from liability for negligence of the crew of the tug during the towing operation. This is a valid provision.[7] Even though the exemption from liability is personal to the party to the contract, a tug performing the towing operation which is merely demised to that company is not liable *in rem*. See Price, "The Law of Maritime Liens", page 128; *The Elizabeth M. Miller*, 3 Fed. Supp. 171, 172; *The Oceanic*, 170 Fed. 893; *The St. Hubert*, 107 Fed. 727.

In *New York Dock Co. v. S. S. Pozan*, 272 U. S. 117 the ship was *in custodia legis*. During the period of such custody, charges for wharfage had accrued. The Supreme Court approved ". . . the general rule that there can be no maritime lien for services furnished a vessel while in custodia legis", 274 U. S. 117 at 120. See discussion of this case, page 498, *The Law of Admiralty*, Gilmore and Black.

Although the Court in the *Pozan* case allowed the wharfage as part of the administration expense because of action by the Court in directing the ship to proceed to the wharf to unload, the effect of the decision is to deny a maritime lien arising while *in custodia legis*. That is plain from subsequent decisions such as *Vlavianos v. Cypress*, 171 F. 2d 435, cert. denied 337 U. S. 924, where it was held that even a lien for crew's wages could not arise during the

7. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291.

time a ship was in the custody of the law. See also *Collie v. Fergusson*, 281 U. S. 52.

That the situation is no different whether the vessel be owned or merely bareboat chartered is made clear by the decisions of this Court in *Ex Parte New York No. 1*, 256 U. S. 490, and *Ex Parte New York No. 2*, 256 U. S. 503. See also *The Anne*, Fed. Cas. 412, where Mr. Justice Storey rejected the personification theory in its strict sense.

The most recent decision where this Court has commented upon the concept of an *in personam* liability separate and apart from liability *in rem* is *Continental Grain Co. v. Barge FVL-585*, 364 U. S. 19 (1960). The argument was there made that a libel with a count against the vessel *in rem* and a separate count against her owner *in personam* involved two separable and distinct claims. This Court commented that such an argument was founded upon "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment". This Court went on to say:

> "This fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. . . .
>
> "This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut down, as it would here, the scope of congressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had limited a shipowner's liability but had failed to refer to the 'personal' liability of the vessel:

"'To say that an owner is not liable but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated. . . .' *The City of Norwich*, 118 U. S. 468, 503 [1886].

"Fifty-seven years later, this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in *City of Norwich* concluded,

"'The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . . Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.' *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249, 253-254 [1943]." *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19, 23-24.

The idea of the personification of a vessel, which is said by some writers to be a part of the law of this country, is more apparent than real. Those who argue for it fail to distinguish, as we submit this Court has by its past decisions, between liability *in rem* and a forfeiture. More precisely, the distinction which really must be made is between a forfeiture and a warranty. The arguments which petitioner makes ignores these distinctions.

Price, in his work "The Law of Maritime Liens", p. 8, discusses the various theories and comments:

"Unless the above explanation [the law of deodand] be accepted, the lack of evidence casts some

doubt on the theory which endows the ship causing damage with an actual personality, especially since it is in the early records that we should expect to find the lien for damage most prominent if it sprang from the primitive notions of deodand (*x*). Actually the lien for collision damage does not seem to have been definitely established till the decision in *The Bold Buccleugh* (*y*). Moreover there are other objections to the theory, for it is improbable that the Court of Admiralty, whose law and practice were based on the civil law, would have been receptive of such primitive ideas (*z*). There is also some evidence to show that no lien for damage was created, for in Browne's Admiralty Law (*a*) it is stated that "the torts of the master cannot be supposed to hypothecate the ship, nor to produce any lien on it".

(*x*) Holdsworth, H. E. L., vol. VIII, p. 272.
(*y*) (1851), 1 Moo. P. C. 267.
(*z*) Holdsworth, *ibid.*
(*a*) Civil Law and Admiralty Law, 1802, Vol. II, p. 143.

No one would seriously question the power of Congress to enact a statute calling for the forfeiture of impure food or a noxious drug. Legislation providing for the forfeiture of the automobile or other instrumentality of transportation engaged in carrying untaxed and illicit beverages or drugs are common examples of this exercise of the legislative power. We stress that this is the exercise of a legislative function and not judicial interpretation of maritime law, common law or even an inherent power of the courts.

Thus to confuse liability *in rem* with forfeiture under a statute for violation of an embargo act, a criminal act of piracy, or of an automobile engaged in the illicit transportation of alcoholic beverages is to confuse basic concepts. One text [8] comments:

"These forfeiture cases [9] had nothing to do with mari-

8. Gilmore and Black, "The Law of Admiralty", page 487.

9. *The Little Charles,* Fed. Cas. No. 15,612; *The Palmyra,* 25 U. S. 1; and *The Brig Malek Adhel,* 43 U. S. 210.

> time lien law or even with admiralty law. They brought up what we would call today 'due process of law' questions. If the quoted passages from the opinions of the two great judges are read with care, it becomes apparent that neither Marshall nor Storey was thinking of admiralty law except in terms of the loosest possible analogy and that no 'principle' of admiralty law was being laid down."

There is a discussion of the entire subject by Gilmore and Black commencing at page 483 and ending at page 510. These writers begin their discussion with the statement:

> "Clarity of thought is not promoted when, by an accident of linguistic history, two unlike things are called by the same name. Growth by analogy has been one of the law's great strengths but when the analogy hit upon is false the result is confusion and stalemate." [page 483]

They end their discussion with the observation:

> "It may be concluded that the fiction of ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute, thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed." [p. 510]

C. The Concept of the Warranty of Seaworthiness and Liability of an Inanimate Object In Rem Are Inconsistent.

The genus of the so-called "warranty of seaworthiness" has never been clearly defined. This Court's deci-

sions indicate it is based on relationship[10] or status.[11] No statement of the warranty, however, has ever suggested that it is consistent with the concept of the ship as an offending instrument. Yet the concept that the instrumentality held liable *in rem* is an "offending thing" is basic to the concept of the inchoate lien which in turn is the basis of the assertion that there is a liability solely *in rem* without some underlying liability *in personam*. Surely modern American law has long since abandoned any concept of "deodand", but if liability *in rem*, without an underlying liability *in personam*, is to be anything more than a security device, then logically we must retreat to the concept of "deodand". Can it be said that an inanimate object, a ship, extends a warranty that some human—and supposedly superior being—will not bring aboard the ship [inanimate and powerless to prevent it] a cargo tray which is defective? Surely liability so imposed could be based only on the concept of "deodand", for is not a warranty contract? Does not contract and/or warranty presuppose someone *sui juris* and capable of making a contract, express or implied, by representation or by voluntary and reasoned decision? Yet, logically the "deodand" concept would forfeit only the offending pallet and not the ship which was merely the *locus* where the offending instrumentality operated.

Petitioner must necessarily rely upon this Court's decision in *The China*, 74 U. S. 53 (1868) and certain statements by Mr. Justice Holmes in *The Common Law*. Whether this Court's decision in *The China* be regarded as the outer limit of the personification theory or as a case of special circumstance explainable upon other grounds, nevertheless, there are important distinctions. In *The China* there was an underlying personal liability, that of the pilot. There are authoritative texts which suggest that the rationale of this Court in its decision in *The China* was based upon misunderstanding of the English law. This is not to

10. The Jones Act, 46 U. S. C. A. § 688.

11. *Seas Shipping Company v. Sieracki*, 328 U. S. 85.

suggest that the result reached in that decision was not correct—merely that the reasons in support of it did not necessarily go so far as its advocates believe. See Marsden's "Collisions at Sea" 9th Ed. pp. 225 and 226. It is there suggested:

> "It is hard to understand why, because the state insisted, on the one hand upon persons who exercised the office of pilots within certain districts being duly educated for the purpose, and insisted on the other, that masters should within these districts take one of these persons on board their ships to superintend the steering, *the usual relation between owner and servant was to be entirely at an end.*[fn]" [Emphasis ours.]

[fn] *The Halley* (1867), L. R. 2, A & E 1, 16 (Sir R. Phillimore). See also Per Lord Stowell, *The Neptune II* (1814), 1 Dods. 467.

In any event the English rule of non-liability of the ship's operator for the negligence of a so-called "compulsory" pilot was shortlived, if it was ever soundly based. *Modern* concepts of agency would almost surely reach the same result the Court did in *The China*, but upon agency principles rather than any concept of "personification of the vessel" [as suggested by Marsden].

D. The Decision Below Is in Accord With Decisions by Other Courts of Appeal.

In a 1956 decision by the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919, Judge Learned Hand, speaking for a two-to-one majority, said that he:

> "could see no reason why a person's property should never be held liable unless he or someone else is liable *in personam*".

That concept has not been followed, even by the Court which wrote it. In 1960, Judge Hand again wrote for the

Second Circuit in *Latus v. United States*, 277 F. 2d 264, and there said:

> ". . . , an implied liability in rem, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and as has been often quoted, 'a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong. The Eugene F. Moran, 212 U. S. 466'. We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner when that fault is not that of a 'bareboat' charterer, or of some specified class of person like a compulsory pilot.
>
> • • •
>
> Grillea v. United States, 2 Cir., 232 F. 2d 919, merely held that a longshoreman might sue a ship in rem if he was injured by her unseaworthiness, . . ." 277 F. (2) at 267.

Judge Hand's language in *Grillea* may well be described as inscrutable. The *Grillea* language was in direct conflict with the language used by the same judge writing for a Court composed of identical personnel in *Burns Brothers v. Central R. R. of N. J.*, 202 F. 2d 910. In that case, a second suit, this time *in rem*, was held barred by an earlier action although it is perfectly clear that had there been a distinct and separate liability *in rem*, the result which the Court reached in *Burns Brothers* could not have followed.

This Court has already noted that the result reached by the Court of Appeals in this case is the same reached by the Court of Appeals for the First Circuit when it had the problem before it. *Guzman v. Pichirilo*, 369 U. S. 698, at 699. As already pointed out, the Court of Appeals for the Second Circuit has also aligned itself with these courts in its more recent decision in *Latus v. United States*, 277 F. 2d 264 (1960). The Court of Appeals for the Fourth

Circuit reached the same result. *Noel v. Isbrandtsen*, 287 F. 2d 783, 785 (1961), cert. denied, 366 U. S. 975.

There is inherent conflict between the first *Grillea* and second *Grillea* decisions.[12]

E. Petitioner's Argument.

Aside from reliance upon *Grillea*, the petitioner seeks to support his contention principally upon three pegs, *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928); *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946) and certain statements in *The Common Law* by Mr. Justice Holmes.

It is first worthwhile to note that this Court has since specifically disapproved a part of its holding in *Plamals v. The Pinar del Rio*. See *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 at 105. Petitioner does not seek to sustain his argument upon the disapproved portion of the *Plamals* decision of course, but when the remainder of the *Plamals* decision is analyzed, it does not support petitioner's contention. The *Plamals* decision indicated that Congress could have, but did not, give a right *in rem* when it enacted the Jones Act. This recognition of Congressional power, applied to our case, surely indicates the authority of Congress to strip a longshoreman of his right to proceed *in rem* as part of the *quid pro quo* for the absolute liability imposed upon the employer by the Longshoremen's and Harbor Workers' Compensation Act, § 905.

There is nothing about *Seas Shipping Company v. Sieracki, supra*, which is helpful to petitioner. In *Sieracki*, this Court recognized that the Compensation Act did restrict and nullify the right of an injured longshoreman against his employer, for the Court noted [328 U. S. at 102] the situation where the shipowner was also the employer as an exception to the rule of *Sieracki*. It pointed

12. Compare *Grillea v. United States*, 229 F. 2d 687 with *Grillea v. United States*, 232 F. 2d 919.

out that this was a "presumably rare" situation. This is one of those rare cases where the longshoreman is in fact in the employ of the owner *pro hac vice* of the vessel.

Reliance upon certain statements in *The Common Law* is misplaced. True it is that Holmes called a ship "the most living of inanimate things."[13]

Holmes also pointed out[14] that ". . . to say 'the ship has to pay for it' was only a dramatic way of saying that somebody's property was to be sold, and the proceeds applied to pay for a wrong committed by somebody else".

It is interesting to compare Holmes' discussion in *The Common Law* with his decisions as a judge. He wrote for this Court in *The Western Maid, supra,* denying the personification theory and followed it in *The Eugene F. Moran, supra,* again denying the personification theory. Holmes certainly recognized that liability *in rem* is a security device peculiarly adapted to maritime commerce in order to obtain jurisdiction and security for claims which arise far from any jurisdiction where the owner may be reached personally. See the discussion at pages 29 and 36, *The Common Law.* See also Holmes' later comment, Vol. 2, Holmes-Pollock letters, page 135, where Holmes is discussing a criticism of his decision in *The Western Maid.* See also the discussion on the same point, Gilmore & Black, *supra,* pages 500-501.

Other authorities relied upon by petitioner can be used to demonstrate the weakness of petitioner's basic argument. The distinction between *in rem* liability for tort and a statutory provision for forfeiture was recognized by this Court in *The Palmyra,* 25 U. S. 1 at 15, 16.

F. The Indemnity Provision in the Charter Contract Neither Justifies Nor Calls for a Different Result.

It is elementary that the indemnity provision in the contract between Waterman and Pan-Atlantic does not cre-

13. *The Common Law,* page 26.
14. *The Common Law,* page 29.

ate rights in third parties. This is a rule of general application in indemnity contracts. More important, however, is that this provision of the contract is merely declarative of the general law upon the subject. Ever since this Court's decision in *The Barnstable*, 181 U. S. 464 (1901) it has been clear and unquestioned that one of the obligations of a demisee is that he is required to return the ship free and clear of liens of all sorts which arose by reason of the operations of the owner *pro hac vice* during the period of the demise. As the district judge pointed out in the case at bar,

> "However, the reasons why an *in rem* action against the vessel in such a case is realistically viewed as an action against the stevedore (and thus barred under the act) are not traceable to any contract of indemnity between parties", (R. 71a)

The law is clear. The owner *pro hac vice* must return the ship to the owner free and clear of liens resulting from the operation by the demisee. Thus where Congress has in clear words [15] exempted the demisee from liability "at law or in admiralty", the Congressionally granted immunity should not be emasculated. If petitioner would have a remedy other than compensation against his employer, his petition should be addressed to Congress and not to the courts. This is particularly true where, as here, the Congressional enactment has been uniformly interpreted by so many courts over such a long period of time.[16]

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15. 33 U. S. C. A. 905.

16. *Vitozi v. Balboa Shipping Company, Inc.*, 163 F. 2d 286 (C. A. 1, 1947); *Samuels v. Munson SS Lines*, 63 F. 2d 861 (C. A. 5, 1933); *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1953); cert. denied 345 U. S. 908; *Bennett v. The Mormacteal*, 160 F. Supp. 840, 254 F. 2d 138 (C. A. 2, 1958); *Noel v. Isbrandtsen Co.*, 287 F. 2d 783 (C. A. 4, 1961); *Pichirilo v. Guzman*, 290 F. 2d 812 (C. A. 1, 1961); reversed on other grounds, 369 U. S. 698.

CONCLUSION.

Examination of the ancient decisions which are said to form the historical base for the concept of a liability *in rem*, separate and apart from any personal liability, will reveal that they concerned themselves largely with maritime liens for repairs and services where the vessel was away from its home port. The concept of a maritime lien upon a ship for services in its home port was rejected. Many of the early decisions concerned themselves with local statutes. The very concept of liability *in rem* separate and apart from personal liability cannot be logically sustained unless of universal application. Therefore, the fact that it was universally rejected in the home port and often was dependent upon local statute demonstrates that, however it may have been described in some decisions, there was not really a separate liability *in rem*. Rather it was a security device. In enacting the Longshoremen's and Harbor Workers' Compensation Act, Congress chose to divest the injured longshoreman of all common law and admiralty claims against his employer and to channel all of them into the Congressionally created remedy of compensation. That Congress clearly had a right to do. Nothing in Congressional history supports or permits a contrary conclusion. The decision of the court below was right and it should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT STEAMSHIP YAKA ON THE MERITS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 509

ELIJAH REED,

Petitioner

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

BRIEF FOR RESPONDENT STEAMSHIP YAKA ON THE MERITS.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

May a vessel be held liable in rem for damages arising from shipboard injury to a longshoreman, caused by an unseaworthy condition created by the demise charterer who is also the longshoreman's employer?

COUNTER-STATEMENT OF THE CASE.

Steamship YAKA, owned by Waterman Steamship Corporation, was delivered under a demise charter to Pan-Atlantic Steamship Corporation on March 19, 1956. Petitioner was injured on March 23, 1956, while employed by the demisee to load cargo aboard the ship at Philadelphia.

The trial judge found that the accident occurred because of the defective condition of a pallet which Pan-Atlantic's longshoremen were using as a platform in the hold to expedite their work. The pallet was not part of the regular equipment of the vessel. It had not been aboard the vessel when the ship was delivered to the demise charterer six days previously. On the contrary, the evidence was undisputed that the wooden pallet was a loading device owned and furnished by the demisee, and used to transfer drafts of cargo from shore into the hold of the vessel on the day of the accident.

Petitioner sued Waterman Steamship Corporation as owner, alleging that the duty to furnish a seaworthy ship and equipment was absolute and non-delegable, even where the unseaworthy condition was created by the demisee and did not exist at the time of the demise. This contention was rejected by the District Court on peremptory exception to the libel, but the exception was dismissed on the ground that evidence might be presented at trial to disclose some connection between the shipowner and the faulty equipment.

Petitioner thereupon instituted the present action in rem against the vessel, which impleaded the demise charterer. The suit *in personam* and the separate action *in rem* were consolidated for purposes of trial, and at the close of the testimony the trial judge granted the motion of Waterman Steamship Corporation for dismissal of the *in personam* suit since it was clear that the unseaworthy condition had been created entirely by Pan-Atlantic Steamship Corporation.

Since there was no appeal from the judgment in favor of the shipowner *in personam*, this constitutes a final adjudication as to the non-liability of Waterman.

Thus recognizing that there was no *in personam* liability on the part of Waterman as shipowner, the trial judge nevertheless found Steamship YAKA liable *in rem* and allowed full indemnity in favor of the ship against the demisee because of Pan-Atlantic's implied warranty to the owner to return the vessel free of liens, and also to make use of it in a safe, proper and workmanlike manner. *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959); *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (1956). (70a, 71a)

Pan-Atlantic appealed on the ground that its status as demise charterer was tantamount to ownership (see *Guzman v. Pichirilo*, 369 U. S. 698 (1962)) and that the fiction of an independent *in rem* liability could not be utilized to circumvent the protection afforded a stevedore employer by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code, Section 901 et seq. The Third Circuit had already decided that the registered owner of a vessel who performed his own stevedoring could not be deprived of this protection by the device of attaching his vessel on the theory of a maritime lien. *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), certiorari denied 345 U. S. 908 (1953).

Steamship YAKA likewise appealed to protect its position on the separate judgment for indemnity.

The Court below reversed the District Court, holding that petitioner had attempted to use the procedural device of a libel *in rem* against a ship for injury in the absence of "any underlying obligation of anyone" to respond in damages.

Although in either event Steamship YAKA will not be required to bear the loss, it is the position of this respondent that the conclusion of the Court below was correct as a matter of law.

ARGUMENT.

I. Personification of Vessels Is an Archaic Fiction of the Admiralty Law Which by Numerous Exceptions Has Been Robbed of Its Validity.

The figurative personality of a ship, aside from its appeal as a literary metaphor, has lost its effectiveness as a reliable fiction in the law of admiralty. The concept of the ship has been rationalized through a century of litigation from a juristic personality endowed with power to commit torts and incur debts into a means of affording relief from some breach of duty committed by the shipowner or those in lawful possession.

Personification in American admiralty law can be traced to three early cases where the ship was forfeited under criminal statutes. Chief Justice Marshall in *The Little Charles,*[1] and Mr. Justice Story in *The Palmyra*[2] and in *Brig Malek Adhel,*[3] upheld statutory provisions permitting seizure of the vessel when used for unlawful purposes, despite the innocence of her owner, as a proper exercise of federal police power under the due process clause of the Constitution. These cases were not concerned with enforcement of maritime liens.

In *The Nestor,*[4] an early maritime lien case involving indebtedness for supplies, Mr. Justice Story likened the lien to the Roman "pawn" or "hypothecation" but indicated that the debt, whatever its traditional roots may have been, was incurred by living persons rather than the ship.[5] Other

1. 26 Fed. Cas. 979, Case No. 15,612 (C. C. D. Va. 1819).
2. 12 U. S. (12 Wheat.) 1 (1827).
3. 43 U. S. (2 How.) 210 (1844).
4. 18 Fed. Cas. 9, Case No. 10,126 (C. C. D. Me. 1831).
5. Learned Hand, J. in *Burns Bros. v. The Central R. R. of New Jersey*, 202 F. 2d 910, 912 (C. A. 2, 1953), ascribed the *in rem* liability of ships to the antiquated 18th Century concept of English law that "guilt attaches to the thing," so that an instrument causing death was forfeit to the crown as deodand, citing Holmes, The Common Law, pp. 24, 25 and Pollock & Maitland, Vol. II, pp. 470-473. Judge Hand characterized the ship's "personal" liability for maritime liens as a "vestigial devolution."

early lien cases found no need to resort to the fiction of the ship's personality. See *The Rebecca*,[6] *Young Mechanic*,[7] and comment in Gilmore & Black, The Law of Admiralty, (1957), Chap. IX, page 488.

The conceptual convenience of the ship's personality, when confronted with situations where it would work manifest injustice, produced anomalous results. Although this Court held in *The China*, 74 U. S. (7 Wall.) 53 (1868), in *The Siren*, 74 U. S. (7 Wall.) 152 (1868), and in *The Barnstable*, 181 U. S. 464 (1901), that a vessel is liable independently of her owner for the negligence of anyone who is "lawfully in possession of her, whether as owner or charterer," a departure from strict adherence to personification appeared in *The Western Maid*, 257 U. S. 419 (1922), where Holmes, J. held that ships on charter to the federal government, itself immune as sovereign from liability *in personam*, were not subject to a maritime lien for collision damage, even after the charter term had ended and they had been restored to the possession of their owners.[8]

In *New York Dock Co. v. S. S. Poznan*, 274 U. S. 117 (1927), this Court referred to "the general rule that there can be no maritime lien for services furnished a vessel while *in custodia legis*." Substantial justice was done in this instance by granting recovery "in equity and good conscience."

Practical justice, equity and good conscience impelled this Court to disregard the ship's "personal" accountability in *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19 (1960). This involved the transfer of *in rem* proceed-

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6. 20 Fed. Cas. 373, Case No. 11,619 (D. Me. 1831).

7. 30 Fed. Cas. 873, Case No. 18,180 (C. C. D. Me. 1865).

8. That same year the English Privy Council reached a similar conclusion in *The Tervaeté* (1922) P. 259. Scrutton, L. J., stated: "In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property." This Court had already recognized the growing divergence of English law in *The Barnstable*, *supra*, at page 467.

ings against the ship from the district where it had been attached into a more convenient forum in the district where the *in personam* action against her owners was already pending. Recognizing the inconvenience of defending *in rem* in Louisiana and *in personam* in Tennessee, the Court followed "the common sense approach" by allowing the transfer under 28 U. S. Code, Section 1404(a), noting "admiralty's approach to do justice with slight regard to formal matters" and that "admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from the other federal practices." See *The Duke of York-British Transport Commission v. United States*, 354 U. S. 129, 139 (1957).

In the foregoing situations, treating the ship as an entity with a fictional personality separate from her owners or those having lawful possession would logically have compelled a different result. This can be taken a step farther, to the situation where the "offending vessel" is manned by pirates, thieves, mutineers, or other unauthorized persons. Even Brown, J. in *The Barnstable, supra*, while supporting the fiction, concedes it does not go so far.[9]

Personification, strictly followed, would limit *in rem* recovery to the value of the *res*, either the vessel under attachment or the bond stipulated for its release. However, this has been disregarded by many lower courts. Where the sum decreed *in rem* exceeded the sale or stipulated value of the ship, such courts have granted recovery for the excess *in personam* against the owner. See *The Monte A.*, 12 Fed. 331 (S. D. N. Y., 1882); *Minnetonka*, 146 Fed. 509 (C. A. 2, 1906); *The Susquehanna*, 267 Fed. 811 (C. A. 2, 1920); *The Fairisle*, 76 F. Supp. 27, 1948 A. M. C. 794 (D. Md.), affirmed 171 F. 2d 408 (C. A. 4, 1948); *Mosher v. Tate*, 182 F. 2d 475, 1950 A. M. C. 1106 (C. A. 9); and *Logue Steve-*

9. See 181 U. S. at page 46, where the Court held that the ship was "personally" liable for the negligence of anyone who is "lawfully in possession."

doring Corp. v. The Dalzellance, 198 F. 2d 369 (C. A. 2, 1952), where *in personam* recovery was denied in the absence of an amendment to the *in rem* pleadings.

In the precedent which the Court below regarded as controlling in the present case (86a-87a) the Third Circuit held that an injured longshoreman could not circumvent the exclusive remedy provisions of the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. Code, Sections 901 et seq., by proceeding against the vessel *in rem* when the shipowner was also his stevedore employer. *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), certiorari denied 345 U. S. 908 (1953). The court looked through the fiction of "the so-called independent personality of the ship" and recognized that an action against the vessel is "realistically" an action against the owner (at page 850). This conclusion was cited and followed in *Pichirilo v. Guzman*, 290 F. 2d 812, 815 (C. A. 1, 1961), reversed on other grounds in *Guzman v. Pichirilo*, 369 U. S. 698 (1962); *Larsen v. The M/V Teal*, 193 F. Supp. 508, 511 (D. Alaska, 1961); *Conzo v. Moore McCormack Lines*, 114 F. Supp. 956, 959 (S. D. N. Y., 1953); and *Bennett v. The Mormacteal*, 160 F. Supp. 840, 841 (E. D. N. Y., 1957). The same result had previously been reached in *Samuels v. Munson S. S. Line, Inc.*, 63 F. 2d 861 (C. A. 5, 1933), and in *Vitozi v. S. S. Platano*, 1950 A. M. C. 1686 (S. D. N. Y.).

One would likewise suppose that, if the vessel is independently accountable for torts committed by those lawfully in possession, an *in personam* proceeding dismissed on the merits would not bar an *in rem* action against her owners for the same negligent acts of her master, officers or crew. In *Burns Bros. v. The Central R. R. of New Jersey*, 202 F. 2d 910 (C. A. 2, 1953), the appellate court disagreed, holding that a decree *in personam* bars a subsequent suit *in rem* on the principle of res judicata. Granting that "it has from the beginning been true that in suits *in rem* the vessel has been regarded as the tortfeasor," Learned Hand, J. characterized the fiction as "atavistic habit," and said (at page 913):

> "* * * Disputes arise between human beings, not inanimate things; and it would be absurd to give the beaten party another chance because on second trial he appears as the claimant to *a vessel that is, and can be, nothing but the measure of his stake in the controversy.*" (Emphasis supplied.)

In *Carlotta*, 48 F. 2d 110, 112, 1931 A. M. C. 742, 745 (C. A. 2), Judge Hand had criticized the fiction as "archaic," "an animistic survival from remote times," "irrational," and "atavistic." His impatience with the doctrine aligned him with this Court in *City of Norwich*, 118 U. S. 468 (1886), where it was said (at page 503):

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, * * *."

In *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249 (1943), at pages 253-254, this Court referred to the foregoing comment in *City of Norwich*, and stated:

> "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. * * * Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? * * *."

It has been said that personification of the vessel, "treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." *Canadian Aviator, Ltd. v. United States*, 324 U. S. 215, 224 (1954). Recognition has not dictated literal adherence to a fiction which would have upset many of this Court's past decisions. The entity concept has been emasculated by logical exceptions to the point where it no longer stands as an impregnable doctrine of maritime law when it is found to be in conflict with over-riding considerations of practical justice, equity and good conscience.[10]

II. The Court Below Was Correct in Holding That a Maritime Lien Depends Upon Some Underlying Personal Obligation of the Shipowner or Other Person Lawfully in Possession of the Ship.

In *Rock Island Bridge*, 73 U. S. (6 Wall.) 213, 215 (1867), this Court laid down the rule that a maritime lien and a proceeding *in rem* are correlative—"where one exists, the other may be taken and not otherwise." This was confirmed in *The Resolute*, 168 U. S. 437 (1897), and in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928), where it was held that a seaman cannot maintain an *in rem* action to enforce his rights under the Jones Act, 46 U. S. Code, Sections 688 et seq., because that statute did not create a maritime lien.

If this Court should reverse the Court below by finding that a maritime lien was created without any personal lia-

10: "It may be concluded that the fiction of the ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute, thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed." Gilmore & Black, The Law of Admiralty, (1957), Chap. IX, page 510.

bility of the shipowner or demisee, as petitioner requests, it would condone the confiscation of property for a private wrong. This the Court has often said should not be done under the guise of an archiac fiction. *The Western Maid, supra.* "In the matter of liability, a man and his property cannot be separated." *City of Norwich, supra.* "There could be no practical exoneration of the owner that did not at the same time exempt his property." *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, supra.*

Petitioner asks the Court to adopt the view expressed by Learned Hand, J. in *Grillea v. United States*, 232 F. 2d 919, 924 (C. A. 2, 1956): "* * * we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'." Yet, Judge Hand had previously criticized personification in the strongest terms (*Carlotta* and *Burns Bros. v. The Central R. R. of New Jersey, supra*); and later he appears to have renounced his own view in *Grillea* by stating in *Latus v. United States*, 277 F. 2d 264, 267 (C. A. 2, 1960):

> "* * * We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner, when that fault is not that of a 'bareboat' charterer, or of some specified class of person like a compulsory pilot."

This Court has held that a proceeding *in rem* is "a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited." *Boyd v. United States*, 116 U. S. 616, 637 (1886).

The Third Circuit looked through the "so-called independent personality of the ship" to prevent an injured longshoreman from avoiding the exclusive remedy provisions of the Longshoremen's Act when his stevedore em-

ployer was also the shipowner in *Smith v. The Mormacdale, supra.* The same principle applies in the present case, where the stevedore employer was the demised owner of the vessel, having rights tantamount to actual ownership. *Guzman v. Pichirilo, supra,* at 369 U. S. 699-700. The demisee, or bareboat charterer, acquires as a concomitant of these rights certain obligations, including the non-delegable duty to furnish safe appliances and equipment, subject to the same warranty of seaworthiness of vessel and gear as the owner would be if he were in actual control of the ship.

In *Vitozi v. Balboa Shipping Co., Inc.,* 69 F. Supp. 286, 289 (D. Mass., 1946), the court found nothing in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 (1946), which "intimates that the obligation of seaworthiness of a ship is imposed on anyone except the owner in control of the ship." On appeal, the First Circuit agreed that for the purpose of maintaining a seaworthy vessel the demisee was in effect the owner, in conformity with cited precedents and "application of general principles of maritime law with respect to demise charters." 163 F. 2d 286, 289 (C. A. 1, 1947).

This was also the position of the Second Circuit in *Cannella v. Lykes Bros. S. S. Co.,* 174 F. 2d 794, 795 (C. A. 2, 1949). In the separate action brought against the demisee, the Second Circuit considered fact issues without questioning the charterer's obligation to furnish a seaworthy vessel. *Cannella v. United States,* 179 F. 2d 491 (C. A. 2, 1950). In *Grillea v. United States,* 229 F. 2d 687, 689-690 (C. A. 2, 1956), where the suit was brought *in personam* against the shipowner, Judge Hand exonerated the owner "who had done no more than put the demisee into possession of the ship" whereas the responsibility rested upon the demisee "on whose initiative and for whose profit the venture had been undertaken."

Where the negligence causing injury to a shipyard workman engaged in rebuilding a ship was solely attributable to his employer, who was protected by the Longshoremen's Act, the court found no basis for *in rem* lia-

bility against the vessel because the shipowner was a "wholly innocent third party." *Pedersen v. The Bulklube*, 170 F. Supp. 462, 467 (E. D. N. Y., 1959), affirmed 274 F. 2d 824 (C. A. 2, 1960), certiorari denied, 364 U. S. 814 (1960).

The fiction of ship's personality was firmly rejected by the Fourth Circuit in *Noel v. Isbrandtsen Company*, 287 F. 2d 783 (C. A. 4, 1961). The court indicated how fully it accepted the position of the Third Circuit by pointing out that the Second Circuit in *Grillea* does not derive support from *The Barnstable, supra*, and was later limited, if not in effect overruled, by Judge Hand in *Latus v. United States, supra.*

This Court has already observed that the Third Circuit had aligned itself with the position of the First Circuit on this question. *Guzman v. Pichirilo, supra*, footnote 2. It is evident that the Fourth Circuit has reached the same conclusion in *Noel v. Isbrandtsen Company*, and that the Second Circuit has taken a definite turn in that direction.

Contrary to the view generally held that the demisor warrants only the seaworthiness of his vessel as it exists at time of delivery under demise, Chief Judge Biggs in his dissent to the denial of petitioner's request for rehearing stated: "A bareboat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable duty to maintain the vessel in a seaworthy condition" (101a-102a). No authorities were cited for thus imposing an impossible burden upon shipowners, whose demised vessels are frequently out of their possession and control for months at a time. At any event, the personal non-liability of the shipowner is res judicata in this proceeding, no appeal having been taken from the dismissal of the petitioner's separate action *in personam* against Waterman Steamship Corporation.

CONCLUSION.

Petitioner asks this Court to reject the position of the First, Third, and Fourth Circuits, and the trend indicated in the Second Circuit, by reversing the Court below and permitting virtual confiscation of the shipowner's property—his vessel—as the result of personal injury for which he is not liable under the law.

The shipowner is not, and should not be, bound to warrant the seaworthiness of his vessel to the world against defective appliances and equipment brought aboard the vessel by a bareboat charterer in carrying out its own business during the term of the demise.

This accident occurred during March, 1956. The libel was not filed until March, 1958; it was brought to trial on issues of liability in January, 1960; and damages were eventually stipulated without further trial in January, 1961 (1a, 3a, 4a). Appellate proceedings then followed. The right of indemnity may be slight recompense to an owner-demisor whose vessel is sold under attachment in a distant port, or whose funds are tied up pending prolonged litigation, over a claim in which he is a wholly innocent party.

The sole justification advanced by petitioner for reversing the Court below is the fiction of ship's personality, which has lost its effectiveness through logical exceptions and has been rejected by this Court and by the lower courts when confronted with considerations of practical justice, equity, and good conscience. Such considerations in the present case require recognition that "a man and his property cannot be separated" and that "there could be no practical exoneration of the owner that did not at the same time exempt his property," as this Court has previously decided.

The undisputed fact that the actual wrongdoer was the demisee, who is protected in this instance by the provisions of the Longshoremen's and Harbor Workers' Compensa-

tion Act, makes it even more unjust to resort to the shipowner's property.

For these reasons, the decision of the Court below should not be disturbed.

WHEREFORE, respondent Steamship YAKA respectfully prays that the judgment of the Court of Appeals for the Third Circuit may be affirmed.

Respectfully submitted,

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